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THE

CIVIL CODE

OF

LOWER CANADA

TOGETHER WITH

A SYNOPSIS OF CHANGES IN THE LAW

REFERENCES TO THE REPORTS OF THE COMMISSIONERS

THE AUTHORITIES AS REPORTED BY THE COMMISSIONERS

A CONCORDANCE WITH THE CODE NAPOLEON AND CODE DE COMMERCE

SPECIAL REFERENCES FOR NOTARIES, CLERGYMEN, PHYSICIANS,

MERCHANTS, REAL ESTATE OWNERS, AND PERSONS

OUT OF LOWER CANADA,—AND

A COMPLETE INDEX

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PREFACE.

This Edition of *The Civil Code of Lower Canada* has been undertaken with the view of supplying a want felt by the Profession, and of rendering a general knowledge of our Laws more easily accessible to the public at large.

A few remarks are needed to complete the usefulness of the different parts of this publication, and, after these, it will not be out of place to give a short statistical account of the formation and labours of the Codification Commission.

The Authorities.

It is important that the members of the legal profession should know in what manner, and to what extent, the authorities given at the foot of each article may be of service to them. First, it must be remarked that they are merely notes of the passages consulted in preparing each article. They were furnished, in compliance with the law, to enable the Judges, and the law officers of the Government, to see upon what authority the articles were based, and were never intended for permanent publication as part of the Code. It was therefore not deemed advisable to incur the labor and delay which would have been involved in verifying and correcting them. In their present condensed form, they have been reprinted with great care from the First Edition of the Reports, which, in this particular, is far more correct than the Second. In the latter edition the text alone had been revised, while the

authorities, had undergone no revision. The type, according to the contract with the printers, had been kept standing, some portions of it for years, and had, therefore, been subject to the dangers, of meddling and of accident, which occur in course of time, even in the most regularly conducted printing houses, including, in this instance, a removal of the matter from Quebec to Ottawa. For this reason, the present edition will be found free from many errors contained in the French pocket edition, in which the authorities are taken from the Second Edition of the Reports.

It must not be supposed that all these authorities are in support of the text; some are directly opposed to the articles above them. As already stated, they are the authorities consulted by the Commissioners, and nothing more. In this edition, moreover, authorities given in the Reports under articles of old law, have been in many instances transferred to the corresponding articles of new law, (contained between brackets), whenever it was considered that they might be of use, by saving the trouble of a reference to the reports themselves.

It will be well also to notice that many authorities, from statutes for instance, although law at the date of the reports containing them, were no longer so when the Code came into force; and that others are no longer applicable by reason of the articles having been modified or changed by the Legislature. Their application may however be traced by referring to the article as it is drafted in the Reports.

The Synopsis

is a revised edition of the one already published by the writer, and which constitutes the main portion of the *Précis* published in the French edition already alluded to.

The References to the Reports

at the foot of each article, apply to the Second Edition of these Reports, which was published in three numbers or volumes. The Roman numerals indicate the volume, and the figures are those of the page in which the article will be found.

The Concordance

was prepared with much precaution in the first instance, and has since been carefully revised. It is intended to complete the connection between our Code on the one hand, and the Code Napoleon with its numerous commentators on the other, by enabling readers of the latter to refer with facility to the former. The converse references from our Code to the Code Napoleon, will be found at the foot of the different articles.

The Special References.

These are by no means intended to restrict the reading of the Code to the articles enumerated, or to enable any class of persons to dispense with a knowledge of the other portions of the work. It is assumed that, even outside of Lower Canada, every literate man in the Dominion ought to avail himself of the means afforded him by our Quebec Code, to obtain a general knowledge of the laws of the oldest of the Confederate Provinces. These references should therefore be understood to be merely for the practical convenience of persons who may have to refer more frequently to the articles enumerated, than to the other parts of the Code.

The Index

is based upon the Official Index just published by the Commission, and has had the further benefit of a few corrections and additions, after a very careful revision.

The Codification Commission.

The first step towards the Codification of our Laws was the introduction, by the Honorable George Etienne Cartier, Attorney-General for Lower Canada, of a measure for that purpose, which became law on the 10th June, 1857. (See p. xxxiii.) This statute, however, for upwards of eighteen months, was not acted upon.

On the 4th February 1859, the Honorable Réné Edouard Caron, one of the Judges of the Court of Queen's Bench, at Quebec, the Honorable Charles Dewey Day, one of the Judges of the

Superior Court, at Montreal, and the Honorable Augustin Norbert Morin, one of the Judges of the same Court, at Quebec, were appointed Commissioners.

On the 10th of the same month, Joseph Ubalde Baudry, Esq., an advocate of twenty-one years' standing, then Clerk of the Court of Appeals, and Thomas Kennedy Ramsay, Esq., an advocate of over six years' standing at the Montreal Bar, were appointed Secretaries to the Commission.

On the 19th November, 1862, the present writer, who was then an advocate of over twelve years' standing, and practising in Montreal, was appointed to replace Mr. Ramsay, whose connection with the Commission had ceased a short time previously, in consequence of a quarrel between him and the Ministry of the day, which had originated in political causes.

On the 7th August, 1865, Mr. Baudry was appointed to the Commissionership rendered vacant by the lamented death of the Honorable A. N. Morin; and Mr. Baudry's place as Secretary was filled by the appointment of the Honorable Louis Siméon Morin, formerly Solicitor-General for Lower Canada, and then an advocate of over twelve years' standing at Montreal.

Some time elapsed before the Commission was fairly organized, and a few months were taken up in making preliminary preparations for the work; such as the elimination of whatever customary or statutory provisions of law had ceased to be in force,—the analysis of the jurisprudence of our courts as established by reported decisions,—and the procuring, in addition to the library at the disposal of the Commissioners, of many works needed for their labors.

The Commisioners presented in all eight Reports on the Civil Code.

The 1st Report, dated 12th October, 1861, contained the draft of the title *Of Obligations*, which, because of its importance, as being the basis of the greater portion of the whole Code, it had been decided to commence with. For the same reason, this title was, even more than any of the others, the subject of long and careful examination and discussion.

The 2nd Report, 28th May, 1862, contained the whole of the *First Book*.

The 3rd Report, 24th December, 1862, contained the whole of the *Second Book*, and the title *Of Prescription*.

The 4th Report, 25th February, 1863, presented the titles *Of Sale*, *Of Exchange*, and *Of Lease and Hire*.

The 5th Report, 19th January, 1864, was composed of the lengthy and comprehensive titles *Of Successions*, *Of Gifts inter vivos and by Will*, and *Of Marriage Covenants*.

The 6th Report, 8th July 1864, comprised the titles *Of Mandate*, *Of Loan*, *Of Deposit*, *Of Partnership*, *Of Life-Rents*, *Of Transaction*, *Of Gaming Contracts and Bets*, *Of Suretyship*, *Of Pledge*, *Of Privileges and Hypothecs*, *Of Registration*, and *Of Imprisonment*.

The 7th Report, 25th November, 1864, presented the remaining titles of the Code, namely, the whole of the *Fourth Book*. It was accompanied by a Supplementary Report, mentioning many corrections and changes, which, after a general revision of all the previous reports, were deemed necessary to be made.

On the 31st January, 1865, the Bill respecting the Civil Code of Lower Canada (*see* p. XXXVIII.) was introduced, and the Reports of the Commissioners, reprinted in a second edition, were laid before Parliament. On the 3rd February following, this Bill, together with the Reports, was referred to a Select Committee, composed of the following members: Hon. Mr. Atty. Gen. Cartier, Hon. Mr. Alleyn, Hon. Mr. Rose, Hon. Mr. Dorion, Hon. Mr. Cauchon, Hon. Mr. Huntington, Hon. Mr. Sol. Gen. Langevin, Hon. Mr. Abbott, Hon. Mr. Laframboise, Hon. Mr. Evanturel, and Messrs. Dunkin, Archambault, Webb, Geoffrion, Dufresne (Montcalm), Denis, Irvine, Joly, Taschereau, Harwood, and De Niverville.

All these gentlemen were advocates, with the exception of Messrs. Geoffrion, Dufresne, and Archambault, who belonged to the notarial profession.

With the exception of a very few changes and additions made in that part of the text which represented our actual law, the Committee considered and discussed that portion only

of the Reports which contained the Amendments suggested by the Commissioners.

On the 13th of March, 1865, the Committee reported. On the 1st September following, the Bill passed the Lower House; on the 6th, it passed the Legislative Council; and on the 8th, it became law.

On the 23rd May, 1866, the Commissioners, after having embodied in the text the amendments adopted by the legislature, and made such changes as were necessary to render the other portions of the Code consistent with these changes, and after having revised and corrected the work throughout, made their final Report, and presented the Civil Code of Lower Canada in the form in which it now is.

On the 26th of the same month, the Governor's proclamation issued, fixing the 1st of August, 1866, as the day on which the Civil Code should come into force.

According to the manner adopted by the Commissioners for performing their work, different portions of the Code were drafted by each of them. Copies of the draft thus prepared by one were furnished to the others, and, after being examined by them individually, it was brought before formal meetings of the Commissioners, at which the Secretaries were also present. At these meetings, each article was separately considered and discussed, and was either adopted, rejected, or modified, according to the conclusions arrived at. This mode of dividing the work, although perhaps unavoidable, has caused a want of uniformity in the style of the Code; an imperfection which it shares, however, in common with the Code Napoleon. Thus, a portion of the work was originally prepared in English, and, of the portion prepared in French, the titles *Of Gifts inter vivos and by Will*, and *Of Prescription*, were drafted by one hand, the titles *Of Privileges and Hypothecs*, and *Of Registration*, by a second, while another hand, again, drafted the remainder.

Although both texts are equally law, it may be interesting, and in some instances, perhaps, useful to know, for purposes of interpretation, which was at first the original and which the translation. It may, therefore, be mentioned that the

Third Book, with the exception of the titles *Of Successions*, *Of Gifts inter vivos and by Will*, *Of Marriage Covenants*, *Of Suretyship*, *Of Privileges and Hypothecs*, *Of Registration*, and *Of Prescription*, and the whole of the *Fourth Book*, were drafted in English.

The translations were made by one or other of the Secretaries, according to the language into which the draft had to be converted. They were carefully examined by the Commissioner who had prepared the original, and were afterwards read article by article at the meetings of the Commissioners, and subjected to such alterations as were deemed necessary. The conversion into English, of those titles, especially, which are derived from the old French law, was not unattended with difficulties, and to overcome these the terms of the Scotch law were in many instances made use of.

The law of 1857 provided that the Reports of the Commissioners, as they appeared from time to time, should be submitted to each of the Judges of Lower Canada for his remarks and suggestions. Mr. Justice Winter, of Gaspe, with the concurrence of Mr. Justice Thompson, of New Carlisle, furnished observations upon the first two Reports. With this exception, this provision of the statute was not complied with. Mr. Justice Meredith, however, now Chief-Justice of the Superior Court, by means of notes occasionally handed in, and of frequent personal interviews with the Commissioners, manifested an interest in the work throughout.

Beyond what has just been mentioned, the only observations, of any consequence, on the work the Commissioners, (so far as the writer knows), were,—a carefully written pamphlet by Thomas Ritchie, Esq., containing observations upon the title *Of Obligations*,—a newspaper article written by Mr. Hervieux, Registrar for the County of Terrebonne, containing remarks on some of the provisions of the title *Of Registration*,—four articles in the *Revue Canadienne* over the signature of E. L. De Bellefeuille, Esq., discussing the provisions of the Draft respecting Marriage and Civil Death, from a religious point of view, and,—a series of articles written in the *Journal de Quebec*,

by C. F. S. Langelier, L. L. D., professor of Roman Law at Laval University, forming a commentary upon the *First Book* of the Draft, as published by the Commissioners.

The same Commissioners have since prepared the *Code of Civil Procedure of Lower Canada*. This Code, too, has been enacted by Parliament, and the proclamation bringing it into force is daily expected to issue. The Commission is virtually at an end, and the Country has reason to congratulate itself that, notwithstanding the difficulties and uncertainties attending so long and arduous a task, the undertaking has at length been crowned with success. The English speaking residents of Lower Canada may now enjoy the satisfaction of at last possessing in their own language the laws by which they are governed, and the Province of Quebec will bring with her into the Confederation a system of laws of which she may be justly proud; a system mainly founded on the steadfast, time-honored and equitable principles of the Civil Law, and which not only merits admiration and respect, but presents a worthy model for legislation elsewhere.

MONTREAL, 20th June, 1867. T. McC.

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SYNOPSIS

OF THE

CHANGES IN THE LAW

EFFECTED BY

THE CIVIL CODE OF LOWER CANADA.

I.

The completion of the Civil Code of Lower Canada is an event which forms an epoch in our history, and is suggestive of many considerations.

In the retrospect, it brings to mind the long and arduous labor, the study, research and learning bestowed upon the work, by the eminent legists entrusted with its elaboration; it announces the successful attainment of a result, aimed at by the enlightened patriotism, and achieved by the ability and persevering energy of a statesman whose name must ever remain connected with the Code; and it presents to us our civil laws rescued from antiquity and chaos, and embodied in a form which renders them accessible and intelligible to all clas*s* of the people whose rights and property they control.

Prospectively, the Civil Code promises uniformity of jurisprudence, which contributes to diminish litigation and add to the stability and security of our civil rights. It offers great additional means of legal education, from which may be expected a higher standard of professional excellence. It will ensure among the individual members of society a more intimate acquaintance with their reciprocal rights and obligations, tending to increase and facilitate business relations, and to promote the material welfare of the community. Moreover, as a conservatory barrier against the continual inroads of fragmentary legislation, it is an earnest of stability in the law itself.

In view of a union of the British American provinces, the codification of our laws is perhaps better calculated than any other available means to secure to Lower Canada an advantage which the proposed plan of confederation appears to have already contemplated,

that of being the standard of assimilation and unity, and of entering into new political relations without undergoing disturbing alterations in her laws or institutions.

Such are the main features presented by the Civil Code, regarded as an embodiment of existing laws; but it has yet other advantages as a work of legislation, inasmuch as it introduces numerous and important amendments, intended for the most part to improve our law as a system, and to adapt it more perfectly to our present state of society.

It is evidently of great importance, that when the Code comes into force, these changes in the law should be known beforehand, at least to the profession, if not to the community at large. They are distinguished in the Code by their insertion between brackets. But, as the former law corresponding with them, as exhibited in the Draft, has disappeared, a previous knowledge of it is necessary in order to understand clearly the difference between the old and new rules; and, as the observations made by the Commissioners, in reporting upon these amendments, no longer accompany the text, a like difficulty exists in ascertaining the reasons which suggested each particular amendment.

To obviate these difficulties, and to furnish a prompt and an easy method of becoming acquainted with the new legislation of the Code, the following synopsis has been written. Great care has been taken to present as succinctly and clearly as possible all the changes introduced by the Code, classifying them according to their character and motives, and referring in every case to the number of the article containing the amendment.

Of these changes generally, it may be remarked at the outset that they are not of a subversive character, or likely to disturb existing relations, or to clash with prevailing notions. They are on the contrary of a nature to harmonize with the ideas of the present day, and to adapt our ancient laws to the changes which since their date society itself has undergone.

It is one of the characteristics of the olden legislation that it appears to have had in view Things before Persons. The conservative spirit of the law seems to have clung to immoveables as the safest basis of social stability, and its policy tended to restrict rather than to encourage the conveyance of real estate. Hence the numerous distinctions of property and the different rules of law to which Persons were subject in respect of each kind of Thing. Hence too, the old rule "*Traditionibus non nudis pactis dominia rerum transferuntur*," and similar maxims. Hence also the facilities afforded for getting back alienated property by means of *retraits*, *rémérés*, and *restitutions*.

On the other hand, in modern society the frequency and multiplicity of transactions have become so great that real pro-

perty now changes hands as rapidly as moveables did formerly. Agreements and promises are practically dealt with as representing the objects to which they relate. The tendency of the age is to make Things subservient to Persons, and to bring immoveables as well as all other things under complete subjection to the will of man, without any other restriction than a due regard for the rights and interests of others.

In order to adapt the old law to the new state of society the Code has introduced a number of new provisions. Some of these are intended to facilitate the free exercise of man's dominion over property. Some, by rendering contracts and other expressions of man's will definitive and reliable, are calculated to furnish elements of stability, for which formerly the nature of immoveable property was relied upon. Others tend to protect the rights of third parties; while some again are merely intended to remedy deficiencies or defects in previous laws.

II.

Taking these different categories in the order in which they have just been mentioned, the changes to be first noticed are those which relate to the FREE DISPOSAL OF PROPERTY.

These may be enumerated as follows:

Under the *Edit des secondes noces*, in force here, a widower, having children and intending to remarry, could not settle by gift, upon the wife he was about to take, any more than a very limited portion of his property. He might, however, subject to a comparatively slight restriction, give away his property to a stranger, or will it away entirely, without any restriction whatever, even to his second wife. This anomaly is removed for the future by article 764, which abolishes the provisions of the Edict, and has the further advantage of favoring marriage.

Hitherto gifts made in favor of an ascendant, who had been tutor or curator to the donor, were null if the ascendant had remarried, or they became so if he afterwards married before the death of the donor. This double restriction, upon the disposal of property and upon second marriages, is removed by article 767.

Gifts could not legally be made in favor of persons with whom the donor had lived in concubinage, nor in favor of the donor's incestuous or adulterine children; and illegitimate children, not incestuous or adulterine, could only receive from their parents to a very limited extent. These restrictions are in a great measure removed by article 768, which places illegitimate children, not incestuous or adulterine, upon the same footing, as regards gifts, as other persons, and allows concubinaries to make gifts in favor of each other when they are contracting marriage; a provision which certainly appears to be more consistent

with morality than the former rule.

Gifts made in favor of the spiritual, medical, or legal advisers of the donor, were liable to be reduced or set aside, upon the presumption of their having been obtained by undue influence. This presumption has no longer any foundation, and as, even in the matter of wills, where there might sometimes be cause for it, it is no longer recognized, it is properly abolished by article 769. Under this article, undue influence, in these as in all other cases, must be proved.

According to the ancient law, children were entitled, notwithstanding any previous disposals by will or by gift, to one half of the share they would have had in the succession of their parents, had no will or gift been made. All gifts and legacies were liable to contribute to this legitim, and were therefore in so far subject to be annulled. The statute of 1801 removed this reservation with regard to legacies, and some were of opinion that its provisions extended by implication to gifts likewise. All uncertainty upon this point is removed by article 775, which abolishes legitim.

Gifts of moveables, not immediately delivered, were not valid under the old law unless the deed contained or was accompanied by an enumeration of the property given. Article 786 dispenses with this formality, and article 788 adds further facility for the conveyance of property by gift, by providing that the acceptance of a gift needs no longer to be in express terms, but may be inferred from the deed or from circumstances.

The intention of a testator, or of a donor, to prevent the property bequeathed or given from being alienated by the legatee or the donee, had no effect under our former law unless the deed mentioned some sufficient motive for such intention, or imposed some penalty in case of non-fulfilment. Article 972 frees prohibitions to alienate from these obstructive formalities.

Article 1267 allows minors, provided they are duly assisted, to make in their contracts of marriage all such agreements or gifts, in favor of their future consorts or children, as contracts of this nature admit of. Our former law restricted their right in this respect to certain portions of their property. Although the article has chiefly in view the favoring of contracts of marriage, its effect is also to assist the free disposal of property, and it has for convenience been included in the present category.

But the most important change introduced by the Code in connection with the free disposal of property, is the adoption of the principle that consent alone suffices, without delivery, to convey ownership. This new rule of law, in direct opposition to the old familiar maxim "*traditionibus non nudis pactis, &c.*," and especially its application in positive terms

even to third parties, created at first some alarm in the minds of persons who had not brought to bear upon the subject as much study, knowledge, and reflection as the Codification Commissioners had done. Among these was the Quebec Board of Trade, which, in a petition to the Legislature, objected to the then proposed amendment "as tending injuriously to affect the interests of third parties, by offering inducements and facilities for secret and fraudulent transfers of property." That these fears were groundless is sufficiently shown by the experience of over fifty years in France, where the courts have persistently maintained the new doctrine in its full extent, notwithstanding the doubtful wording of the Code Napoleon as regards third parties. That the rule is not a dangerous one may also be inferred from the fact of its being adopted in the Code of Louisiana and in the Codes of several of the States of Europe, and from its more recent enactment in England by the imperial statutes of 1856, chapters 60 and 97. Practically, the only difference between the two systems is, that under the Code the want of delivery cannot be invoked against a purchaser in good faith; that against a purchaser in bad faith, the well established rule that fraud must be proved obtains in this as in other cases; and that the absence of delivery, although it may afford strong evidence of fraud, cannot constitute a presumption *juris et de jure*. Article **1025** lays down the principle. Its application to immoveables is, however, in the interest of third parties, subjected by article **1027** to the provisions of the Code concerning registration. The same article also declares, as regards moveables, that of two purchasers of the same thing, from the same owner, the one who is in *bona fide* possession of it shall be deemed owner. The reasons of this exception are the almost impossibility of following a moveable when it passes through many hands, the inconvenience and expense of annulling the several transactions by which it was transferred, and the consequent embarrassment of commercial dealings.

The sufficiency of consent without delivery is applied to Gifts by article **777**, and by article **795**. The former declares delivery unnecessary, and gives donees, whose deeds are registered before the donor's death, a right to claim from his heirs things given but not yet delivered. The latter declares acceptance, without delivery, sufficient to complete gifts *inter vivos*.

Article **1472** applies the same rule to Sale, which it consequently defines as a contract by which a man *gives* a thing for a price, &c., instead of, as formerly, a contract by which a man *obliges himself to give the enjoyment* of a thing, &c. As a corollary of this definition it follows that a person cannot sell what does not belong to him, and that, if he does, he is

liable in damages towards any purchaser ignorant of the fact. This is declared in article **1487**. But, in order to avoid practical inconvenience, article **1488** admits the validity of the sale when the matter is commercial, or when the vendor afterwards becomes owner of the thing. It also retains the rules of the old law with respect to things lost or stolen. These, when bought at a judicial sale, cannot be reclaimed, and when bought in a fair or market, at a public sale, or from a trader dealing in similar articles, can only be reclaimed upon reimbursing the price paid for them.

Following out the same principle, article **1493** declares that the vendor's consent to the buyer's removal of the thing sold, when there is nothing to hinder such removal, is sufficient to satisfy the obligation to deliver. Article **1570** renders the sale of debts and rights of action perfect, between the buyer and the seller, by the completion of the title, if authentic, or the delivery of it, if it is under private signature. And article **1579** obliges a person who sells a right of succession, without specifying the property of which it consists, to warrant his right as heir. Under the old law he only warranted the existence of the succession.

Under article **1596**, Exchange, like Sale, is completed by consent alone.

Another branch of the law in which important changes have been made with the view of facilitating the disposal of property, is that relating to Wills. The formalities attending these acts have been simplified, and the English and the French forms have been more nearly assimilated.

Thus, article **843** simplifies the French form by dispensing with the formality of dictation, (*dicté et nommé*), and the reading over of the will a second time; and article **844**, as regards the same form of wills, allows aliens to be witnesses, and requires that the witnesses shall be of full age. In the latter particular there is a slight restriction, not found in the old law which allowed persons over twenty years of age to be witnesses. When the age of majority was twenty-five years, there was some reason for admitting witnesses under that age and above twenty, but since the full age has been fixed at twenty-one the reason has no longer the same force. It is almost useless to make a special category of persons between the ages of twenty and twenty-one, and this rule, requiring the witnesses to be of full age, has, moreover, the advantage of being the same as that which applies to wills in the English form.

Under our former law a will could not be executed before notaries who were related or allied to the testator to the degree of cousins-german inclusively, nor before notaries and witnesses *very nearly* related or allied to one another. Article **845** gives a more simple

and definite rule, by removing altogether the incompetency of witnesses by reason of relationship or alliance, and restricting the prohibition, as regards notaries, to those who are related or allied to the testator, or to each other, in the direct line, or in the degree of uncle, brother, or nephew.

Hitherto legacies made in favor of the notaries or witnesses before whom a will was executed, or of their relations or connections to the degree of cousins-german inclusively, were not only null, but had the effect of annulling the whole will. Under article **846**, this nullity is limited, as regards the legacies, to those made in favor of the notaries or witnesses, of the wife of any such notary or witness, or of any relation of his in the first degree, and, as regards the remainder of the will, is done away with; the nullity of the legacy no longer entailing that of the whole will.

Article **853** contains similar provisions respecting wills in the English form, except that, as females may be witnesses to these wills, husbands of witnesses are added to the category of those to whom legacies cannot validly be made.

Article **847** provides a mode by which deaf mutes, and others who cannot speak, may make wills in the authentic or French form. The amendment was only needed for wills in this form, as the existing law already afforded these persons the means of making wills in the holograph form, (art. 850), or according to the form derived from the laws of England (art. 852.)

Article **851** enacts that, in wills in the English form, the two witnesses must attest the signature at the same time, and the testator must produce the will, and acknowledge his signature to it, in their presence. Under the old law the witnesses did not require to attest the will at the same time, nor was the same acknowledgment necessary. This article moreover subjects moveable property to the same formalities as immoveable property, though formerly it might, according to the English form, be willed by means of any writing of a nature to indicate the intentions of the testator. These provisions, viewed in relation to wills in the English form only, are certainly restrictive, but considered in relation to the subject of wills generally, and as an approximation to the authentic form, they contribute to simplify our double system, and by this means indirectly facilitate the disposal of property. For these reasons they have been mentioned under their present head.

Other provisions adapted to facilitate the disposal of property, (rights and claims being considered as such,) are to be found in article **1155**, which allows conventional subrogations to be made by private writings, and provides that such subrogations shall become effectual against third parties by means of registration. The old law required that subro-

gations should be made by authentic deeds.

III.

The next class of changes to be noticed consists of those which have in view the STABILITY OF RIGHTS.

Under this head are comprised such provisions as are intended to maintain contracts in their integrity, and such as tend to preserve established relations, either by limiting the actions which might disturb them, or by shortening prescriptions and simplifying the rules which apply to them.

With a view to the integrity of contracts, minors and interdicted persons are no longer relievable from their acts, when they have been legally assisted. It was no doubt considered that such persons are sufficiently protected by the formalities without which their interests cannot be affected, by the presumed knowledge and integrity of the tutors or curators appointed to represent them, and by the recourse which they have against these representatives. Thus, article **301** declares that minors are not relievable from the acceptance or renunciation of successions; but in order to protect them, on the other hand, it provides that tutors shall no longer accept or renounce successions for their pupils, without judicial authorization and the advice of a family council. Similar provisions are contained in article **1341**, with regard to the acceptance of community by a minor wife surviving her husband; in article **307**, as regards transaction; in article **792**, with regard to the acceptance or renunciation of gifts; and in article **1010**, with respect to contracts for the alienation of real property, or the partition of successions. Minors duly assisted, though not generally relievable from stipulations contained in their contracts of marriage, were so when the gifts or advantages were excessive; but article **1006** no longer recognizes any exception, and these stipulations are now as effectual as those made by persons of full age. Under article **310** emancipated minors are no longer relievable from any acts which the law allows them to perform, except in so far as persons of full age would be; and under article **1551**, minority does not suspend the lapse of the period within which a right of redemption must be exercised.

Although in some of the foregoing articles interdicted persons are not mentioned with minors, the same rule should apply to both, and article **343** declares this by necessary implication, if not in express terms.

As to persons of full age, they can no longer avoid their contracts on the ground of lesion. Such is the enactment of article **1012**; and article **751** prevents them from doing so even in the case of partitions of succession.

As further tending to establish the system of integrity of contracts, by making them as

binding as possible upon the parties, article **1076** provides that the sum stipulated in a contract, as damages for its non-performance, is no longer liable to be modified by the court, although, if the contrary has not been specially agreed upon, it permits a reduction in cases where the contract has been beneficially performed in part, and where the time for the performance is not material. Similar provisions are contained in article **1135**, with respect to the penalty stipulated for the inexecution of the contract; and article **1149** deprives the Circuit Court and Commissioners' Courts of their power of ordering sums actually payable to be paid by instalments, without the consent of the creditor.

Under article **1663** the alienation of property leased no longer annuls the lease, unless the lease contains a special stipulation to that effect and is registered. But article **1664** provides that if under such stipulation the lessee is expelled, he cannot recover damages, unless he has expressly reserved the right to do so.

Article **1186** conforms to the same principle of binding parties to perform what they have undertaken, by enacting that the amount paid by a surety for his release shall no longer go in reduction of the amount due by the principal debtor. It may, however, be imputed in discharge of the cosureties, in cases where they have a recourse against the one released, and to the extent of that recourse.

In sales of immoveables, the right of dissolution for non-payment of price, and in gifts of immoveables, the right of revocation for non-fulfilment of conditions, were rights which, under the former law, though not stipulated in the contract, might at any time put an end to it. In order that the integrity of contracts should not be affected by rights which are not stipulated by them, and that third parties should be protected in all dealings based upon such contracts, articles **816**, for Gift, and **1536**, for Sale, provide that these rights shall no longer be exercised unless they are expressly reserved in the deed. When so reserved, they are similar in many respects to the stipulated right of redemption of immoveables sold. All three are limited as to their duration; their exercise is kept within the terms of the contract; and they are governed by similar rules. Some of these rules are in amendment of the former law. Thus, article **816** subjects the revocation of gifts for non-fulfilment of conditions to the same rules as the dissolution of sale for non-payment of the price, and does away with the necessity of obtaining a preliminary judgment condemning the donee to fulfil the conditions imposed by the gift. Article **1538** declares that the judgment dissolving a sale for non-payment of price must be absolute, instead of, as formerly, granting delay for the

payment, and only becoming absolute when such delay had expired. So long, however, as the judgment has not been given, the buyer may prevent its being rendered by paying the price with interest and costs of suit. Article **1542**, contrary to the old rule, provides that a suit brought for the price is not a waiver of the right to dissolve the sale for non-payment; and article **1537** subjects this right of dissolution to the rules relating to the right of redemption, which are contained in subsequent articles; among these, articles **1548**, **1549**, **1550** and **1551**, contain new law. Article **1548** forbids any stipulation of a right of redemption for a period exceeding ten years, and reduces to ten years any longer term stipulated. Article **1549** enacts that the term stipulated must be strictly observed and cannot be extended by the court; formerly the right was not lost by the expiration of the period agreed upon, and it had to be declared extinct by a formal judgment. Article **1550** makes the buyer absolute owner of the thing if the seller fails to exercise his right of redemption within the stipulated time. Article **1551**, which has already been noticed, enacts that the period agreed upon runs even against minors and other incapable persons. Formerly these rights were prescribed by thirty years, but by article **2248** no prescription is required, as they are absolutely limited, either by the legal term of ten years, or by any shorter term stipulated.

Another cause of defeasance was the subsequent birth of children to a donor, by means of which the gift became null. Under article **813** a gift can no longer be annulled by this means, unless the deed contains a stipulation to that effect. The opinions and habits of former times may perhaps have justified a presumption that gifts were tacitly understood between the parties to be subject to this resolutive condition, but at the present day no such agreement would enter tacitly into the minds of the contracting parties. The right of annulling the contract for such a cause being therefore contrary to the real intention of the parties, and, moreover, injurious to the interests of third parties in their relations with the donee, it has very properly been abrogated.

Under the old law the property belonging to a substitution was liable to a subsidiary recourse which the wife of the institute could exercise against it, for securing her dower or her dowry. This rule was founded upon a presumption that the grantor of the substitution had in view the advantage of the institute rather than that of the substitute, and was therefore willing to promote the marriage interests of the former in preference to the direct interests of the latter. The correctness of this presumption even under the ancient system might well be questioned, but it is certainly no longer applicable to our

present usage, according to which the substitute is generally the party whose benefit is chiefly in view. Article 954 accordingly does away with this liability, and so far maintains the integrity of the substitution.

Another presumption tending to annul, if not a contract, at least the written expression of a man's intentions respecting his property, was that in virtue of which legacies were deemed to be revoked when, subsequently to the will, enmity, to certain degrees, had sprung up between the testator and the legatee. This is another of those presumptions which have ceased to be well founded. The correct inference at the present day would be, that if the enmity had the effect of changing the testator's intentions it would also cause him to revoke the legacy in an express manner. Article 893 accordingly declares that enmity does not establish a presumption of revocation.

The provisions which have in view the maintenance of established relations embrace the whole subject of prescriptions, whether *acquirendi causâ*, or *liberandi causâ*, or, according to the language of the Code, adopting that of the Scotch Law, whether *positive* or *negative*. These provisions tend to attain their object, some by creating limitations where none before existed, some by shortening prescriptions already existing under the previous law, and others by extending or by simplifying the rules of prescription, so as to secure greater uniformity and the more easy acquirement of prescriptive rights.

New limitations are introduced by the following six articles. Article 149, in the case of marriages contracted in error or without free consent, provides that no action to annul the contract shall be brought, if cohabitation has continued for six months after the party has acquired full liberty, or has become aware of the error. Article 151, in the case of minors contracting marriage without the necessary consent and formalities, provides that the persons whose consent was necessary cannot demand the nullity of the marriage if, after becoming aware of its having taken place, they have allowed six months to elapse without making any complaint. These marriages, now as formerly, become valid when even tacitly approved, but as the lapse of time from which a tacit approval might be inferred was not fixed, a specific limitation was evidently desirable. Article 233 limits to the term of two months a husband's right to disown a child born to him during his marriage; and article 234 extends this provision to the husband's heirs. Article 423 limits to one year the right of a proprietor to reclaim any distinguishable portion of his land which by the sudden force of a river or stream has been carried on to the property of another. Under the old law he could not

reclaim it when by length of time it had become apparently incorporated with the adjoining property. This rule was indefinite, and is advantageously replaced by that of the Code. Lastly, article **1040** declares that contracts entered into by debtors in fraud of their creditors cannot be set aside at the suit of the latter, unless the action is brought within a year from the discovery of the fraud.

The shortening of prescriptions was not only desirable generally for the better preservation of established relations, but it had become expedient in some instances from the improved means of modern travelling and correspondence. All parts of the world are now brought into closer connection, and the obstacles of distance and delay have been comparatively removed. Absences are now so usual and so frequent that they no longer call for exceptional legislation, and they so slightly interrupt home relations that absentees have ceased to require years of delay for their protection. The ten extra years formerly allowed to absentees in the matter of prescription have therefore been dispensed with, and the old prescription of ten years *entre présents*, or twenty years *entre absents*, is now simply one of ten years without distinction. The articles which have been framed in conformity with this change are **2206, 2251, 2252, 2254, 2255, 2256, 2257.**

The privilege which the church and religious houses formerly enjoyed, of not being prescribed against by any time less than forty years, is abolished, for the same reasons as those above given, and, under article **2218**, prescription may now be acquired against them by thirty years, as against other persons. Immemorial or centenary prescription has also, by article **2245**, been abolished, and the effects resulting from it are attributed to that of thirty years; and article **2270** extends this provision even to prescriptions begun before the Code comes into force.

Article **1116** provides that a joint and several debtor from whom the creditor has continued, during ten years, and without reservation, to receive a separate share of arrears or interest, is relieved from his joint and several liability, even for future arrears or interest, or for the capital itself. The period was formerly thirty years, but with us the ten years is quite sufficient to establish a presumption of the creditor's acquiescence, and the shortening of the term is in conformity with the general policy of the Code in matters of prescription.

Article **2250** establishes a uniform negative prescription of five years for all arrears of rents, rent, interest, and natural and civil fruits generally. Constituted rents were already subject to this limitation, but all the other arrears were only prescribed by thirty years. Uniformity and the mainten-

ance of existing relations are not the only motives of this amendment; another reason is founded upon the fact that the conventional rate of interest is no longer restricted, and that the evil of allowing arrears to accumulate is in consequence the more to be apprehended.

The time of nearly all the shorter negative prescriptions has been reduced, and they have been conveniently classified by articles **2260**, **2261** and **2262**.

Thus, article **2260** enumerates the actions which will be now prescribed by five years. It includes some which were formerly subject to a different limitation and with respect to which consequently the law is changed. These are: 1. The action of notaries for professional remuneration. Formerly there was no other limitation than the general prescription by thirty years. 2. The action against attorneys, notaries and judicial depositaries, for the recovery of papers and titles. Under the old law this action was prescribed by five years from the end of the proceedings, when the documents had served, but only by ten years from their reception, when they had not been produced, or the proceedings were not ended. The change consists in fixing the period at five years in either case. 3. Actions upon claims of a commercial nature. This abolishes the former six years prescription, and substitutes the period already allowed for actions upon bills and notes. 4. All actions upon sales of moveable effects. Claims of this kind between traders, or between traders and non-traders, would fall under the preceding category as commercial matters, but the article goes further, and, by specially including sales between non-traders, extends this prescription to all sales whatever of moveable effects. 5. Actions for hire of labor, or for the price of manual, professional or intellectual work and materials furnished, except such as are hereinafter mentioned as being subject to a still shorter prescription. These actions under the former law, would have been prescribed by six years or by thirty.

Article **2261** enumerates the actions to which the Code applies a prescription of two years. 1. Actions for seduction or lying-in expenses. The former period was five years. 2. Actions for damages resulting from offences or quasi-offences, whenever other provisions do not apply; these formerly lasted six years. 3. Actions for wages of workmen, not reputed domestics, and who are hired for a year or more. Under the old law these actions were prescribed by six or by thirty years, according as the matter was of a commercial nature or not. 4. Actions for sums due schoolmasters and teachers, for tuition and board and lodging furnished by them. The old law required only one year.

Article **2262** enumerates the actions which are subjected to a prescription of one year.

Those in which that period changes the previous law are: 1. Actions for bodily injury, not provided for by special laws. These actions formerly came under the general prescription by thirty years. 2. Actions for wages of domestic or farm servants, merchants' clerks, and other employees hired for less than a year. Merchants' clerks were formerly subject to the six years prescription, and the servants or employees had a right to recover for one year besides the current year or month, according to whether they were hired by the year or by the month.

The articles to be next explained are those which tend to produce greater simplicity, uniformity, or facility, in the matter of prescriptions.

As regards the prescription of moveables and personal actions under our former law, different rules obtained. In commercial matters the English rule governed, by which they were subjected to the *lex fori*; in all other matters the French rule prevailed, which subjected them to the law of the domicile of the debtor or the possessor. Then as to the admissibility of foreign or partly foreign prescription, the law was also different, according to whether the matter was commercial or not.

Articles **2190** and **2191**, partaking of both systems, have adopted a uniform rule, applicable to moveables and to personal actions generally, whether in commercial matters or not, and subjecting them to the *lex fori*. Under the former article prescription entirely acquired under foreign law, before the possessor or debtor was domiciled here, may be invoked, if the cause of action did not arise, or the debt was not stipulated payable, in Lower Canada; and prescriptions partly acquired under a foreign law may, under the same restrictions, be invoked, provided they have begun abroad and are completed under our own law. Prescriptions entirely acquired in Lower Canada may be invoked, dating from the maturity of the obligation, when the cause of action arises, or the debt is stipulated to be paid, or the debtor, at the time of the maturity, had his domicile, in Lower Canada; and in other cases, from the time when he becomes domiciled in that portion of the Province. Under the latter of these articles, prescriptions begun under the law of Lower Canada must be completed under the same law, without prejudice to those acquired wholly or in part under foreign law in conformity with the preceding article.

Under our former law possession obtained by violent or clandestine means could never avail for prescription, but article **2198** adopts the more equitable and logical rule, that when these defects have ceased prescription may commence. Neither the thief, however, nor his heirs or successors by universal title, can by any length of time prescribe the thing stolen.

Article **2203** declares that good faith is always presumed; under the old law it was presumed when possession accompanied title. The amendment seeks to remove all doubt or restriction from the simple and just rule, which prevails throughout the Code, that fraud or bad faith must always be proved.

Other provisions intended to extend or simplify the rules in matters of prescription, are concontained in following articles: Article **2207**, in cases of substitution, enables the substitute, even before the opening of his right, to bring an action to interrupt prescription; and, having thus destroyed the only reason why, under the old law, prescription did not run against him, it declares him to be, like other persons, liable to be prescribed against, unless protected by minority or other disability. Article **2232**, which should be taken in connection with article 2269, is intended to explain and to limit the application of the old maxim: *contra non valentem agere non currit prescriptio.* This rule is restricted generally to such persons as are under an absolute impossibility, in law or in fact, of acting by themselves, or of being represented by others. Minors, however, as well as insane persons, are not subject to the prescription by thirty years, nor to that in favor of subsequent purchasers of immoveables with title and in good faith, nor to the ten years prescription of actions in rescission of contracts for error, fraud, violence or fear. Article **2240** applies to all prescriptions the uniform rule which formerly applied only to the short prescriptions, namely that they are reckoned by days and not by hours, that they are acquired when the last day of the term has expired, and that the day on which they commenced is not counted. Article **2246** declares that commercial debts, although prescribed, may be pleaded in compensation. Under the former law this was not allowed; the object being, no doubt, to prevent a debtor in bad faith from paying his debt by setting off against it prescribed claims or notes which he had bought up. The article, however, attains this object by providing that, in all cases, prescribed debts can only be pleaded in compensation when the compensation took place before the prescription. Commercial debts as well as others are therefore brought under one uniform rule. Article **2267** no longer admits of the controversies which frequently arose, as to whether a particular negative prescription was intended by law to establish a presumption of payment, or whether it was an absolute bar to the action. Negative prescriptions are not only declared absolute, but the article even dispenses with the necessity of pleading them. Article **2268** declares that in the matter of prescription of moveables, the three years shall be computed from the

loss of possession. This prescription may consequently be set up by any person in actual possession of the thing three years after the dispossesion of the party claiming it. Under the old law requiring three years possession, it was difficult and often impossible for the possessor, owing to the nature of moveables and the frequency with which they change hands, to prove the possession of the persons from whom his own was derived. The article removes this difficulty, and also extends the prescription to cases in which the moveable has been stolen; it being considered that in these cases, as in those in which immoveables are concerned, the good faith of the possessor, rather than the bad faith of the person from whom he derives his title, should be the guide in determining the legality of the possession.

IV.

The next head to be noticed is that of the PROTECTION OF THIRD PARTIES.

The principal means of protecting third parties, is the publicity given to all contracts or claims by which their interests may be affected. Nearly all the articles under this head will therefore be found in the title *Of Registration*. A few, however, which do not fall under that title, may be mentioned first.

Article **731** preserves the hypothecary claims of creditors upon immoveables returned by an heir to the mass of a succession. Formerly third parties having such claims upon property subject to be returned were liable to lose their right of hypothec when the return took place. Article **812** provides that gifts will no longer be subject to be dissolved by reason of the subsequent birth of children to the donor. Article **1313** requires, for the information of third parties interested, that all judgments ordering separation between husband and wife, shall be inscribed upon a posted list kept for that purpose. Article **1536** declares that the non-payment of price, in Sale, shall not be a ground for dissolving the contract, unless the deed contains a stipulation to that effect. This stipulation, followed by the registration of the deed, being a sufficient notice to third parties that the price remains unpaid. Article **932** limits substitutions to two degrees, exclusive of the institute. This restriction enables third parties, acquiring rights upon property, to guard against substitutions without being obliged to trace back the title deeds beyond a limited time. It is also based on other, and perhaps more important, motives, but its benefit to third parties has been selected, for convenience, in order to place the article under the present head.

The articles which now contain new provisions in the matter of registration may be enumerated as follows: **661** requires the registration of

judgments authorizing the acceptance of successions under benefit of inventory; **981** declares that prohibitions to alienate must be registered, even as regards moveable property; **2047** and **2130** render hypothecs ineffectual, even between the contracting parties, unless they are registered; the only exception being the hypothecary claim of mutual insurance companies for the payments due by parties insured; **2088** does away, for the future, with the provision of the statute under which open and public possession was equivalent to registration; **2098** requires that in registering wills the date of the testator's death should also be registered; it also provides for the registration of title by descent, and deprives of any effect all conveyances, hypothecs, or real rights granted upon immoveables by owners who have not registered their title thereto; **2100** obliges vendors to register their stipulated right of taking back an immoveable sold, in the case of non-payment of the price, but allows them a delay of thirty days to do so; **2101** enacts that all judgments annulling deeds by which immoveables are conveyed or transmitted, or permitting redemption or revocation, must be registered; **2102** declares that no action founded upon the right of a vendor to dissolve a sale for non-payment, or upon a vendor's right of redemption, can be brought against third parties, unless the stipulation of such right has been registered; **2107** requires that memorials of claims for funeral expenses, and expenses of last illness should be registered within six months of the death, in order to preserve the privilege attached to such claims; **2116** provides for the registration of the right to customary dower; **2119** obliges notaries, on pain of all damages, to see to the previous registration of the tutorships of such minors, or the curatorships of such interdicted persons as are interested in any inventories they are called upon to make; **2126** declares renunciations of dower, of successions, of legacies, or of community of property, ineffectual against third parties, unless they have been registered; **2127** requires and provides for the registration of transfers or subrogations of hypothecary claims, and **2178** provides for their being mentioned in any copy of the documents creating such claims delivered by the registrar; **2128** renders leases of immoveables for more than a year inoperative against third parties unless they are registered; **2129** declares that no discharge from the rent of immoveables, for more than one year in anticipation, shall avail against a subsequent purchaser, unless it has been registered together with a description of the immoveables; **2140** requires that memorials for the preservation of interest or arrears of rent, besides the formalities already prescribed by law, shall be accompanied

by an affidavit of the creditor that the amount thereof is due; **2162** enacts that the provisions under which registrations may be effected in Quebec and Montreal, in separate books according to a certain classification, may be applied, by proclamation of the governor, to any registration division the population of which exceeds fifty thousand souls; **2175**, with respect to the obligation of owners of immoveables designated upon the official plan to deposit a separate plan and book of reference for such immoveables whenever they subdivide them into town or village lots, limits that obligation to cases where the property is subdivided into more than six lots; and **2182** requires the entry-book and the index to immoveables to be authenticated in the same manner as the register.

V.

The next and most numerous class of amendments introduced by the Code comprises those which tend to the GENERAL IMPROVEMENT OF THE LAWS, either by rendering them more simple, convenient, or uniform, or by supplying deficiencies, or removing useless provisions.

These will be best classified in the order of the titles in which they occur.

In the title *Of Acts of Civil Status*, article **71**, for the sake of uniformity, prescribes that the registers in which acts of religious profession are inscribed shall be authenticated, in the same manner as other registers of civil status; and article **77**, supplies an omission in the law, by providing a remedy in cases where an act of civil status has been entirely omitted from the register. Provision already existed for rectifying such entries, but none to meet the case of their total omission.

In the title *Of Absentees*, article **93**, in view of the modern facilities of communication with distant parts of the world, reduces, from ten years to five, the period after which the presumptive heirs of an absentee may obtain authority to take provisional possession of his property; article **97**, for the protection of the absentee, obliges the persons obtaining the provisional possession to cause the immoveable property to be examined by skilled persons in order to establish its condition, and provides for the homologation of their report, and the payment of the expenses out of the absentee's property.

In the title *Of Marriage*, article **132**, supplying a deficiency in the former law, renders it incumbent upon the officier about to solemnize a marriage to asertain that there is no legal impediment to it, whenever the last domicile of the parties was out of Lower Canada, and the bans have not been published there. Article **141** provides a means of opposing the marriage of an insane person, even if he is of age and has not been interdicted. The right of making such oppositions is given to the nearest

relations or connections, to the exclusion of others, and in the order mentioned in the article. This insanity must however be established without delay, by interdiction; and article **143** declares that any such opposition falls to the ground, without any demand for its dismissal, if it is not followed up with the necessary formalities and within the delays prescribed by the Code of Civil Procedure. Articles **157** and **158** subject officers solemnizing marriage to a penalty not exceeding five hundred dollars, for any infringement of the rules by which the law requires them to be governed.

In the title *Of Separation from Bed and Board*, article **203** supplies a remedy in the event of a wife leaving the residence assigned to her during the pendency of a suit in separation. The husband, in such case may be released from his obligation to pay her an alimentary pension, or, in case she persists in not returning, when ordered by the court, her action may be dismissed; saving her right to bring another. Article **210**, for the sake of convenience as well as propriety, provides that a wife who is separated from bed and board, and requires to be authorized for any act tending to alienate her real property, may apply to a judge directly for such authorization, without being obliged, as formerly, to seek that of her husband in the first instance.

In the title *Of Filiation*, article **225** prescribes the mode by which a husband may disown a child, and article **226** renders that mode indispensable, by declaring that in default of its being followed within the proper time, the child will be held to be legitimate.

In the title *Of Minority, Tutorship and Emancipation*, article **276** reduces from three to two the number of tutorships which justifies a person in refusing to accept another; that of his own children excepted. Article **301** remedies a defect in the former law by providing that tutors shall no longer accept or renounce successions for their pupils without the advice of a family council, and that, even then, the acceptance can only be under benefit of inventory. Article **302**, conferring a benefit upon minors without prejudicing the interests of any other parties, provides that when a succession has been renounced in behalf of a minor, it may afterwards, if no one else has accepted it, be accepted either for him, under the proper authorization, or by him, when he has attained his majority. But he must then take it as he finds it, and subject to all sales or other acts legally done during its vacancy. Article **304**, for expediency and uniformity, extends to fifty dollars the amount for which minors may bring an action to recover wages.

In the title *Of Majority, Interdiction, Curatorship and Judicial Advisers*, article **344** supplies a deficiency in the

former law by allowing curators, other than the husband or wife, or ascendants or descendants of the interdicted person, to be relieved from their charge whenever they have held it for ten years.

In the title *Of the Distinction of Things*, article **388**, adapting the law to the manner in which rents are actually dealt with in the present state of society, declares constituted rents, and all other perpetual or life-rents to be moveables by determination of law; saving those resulting from emphyteusis. Articles **393** and **394** provide for the redemption of rents, whether perpetual or temporary. The latter, when no reimbursment of the capital is to take place at their termination, are assimilated in this respect to life-rents, the redemption of which is provided for in article 1915.

In the title *Of Real Servitudes*, a few changes have been introduced, in order the better to adapt to the habits and wants of the present day the rules which govern the relations between neighbouring proprietors. Thus, article **514** allows beams to be inserted in common walls to within four inches of their thickness, instead of one half of the thickness as formerly; this distance is however subject to be reduced to the one half, in the event of the neighbour wishing to insert beams on his own side, at the same place, or to build a chimney against that portion of the wall. Article **521** regulates the respective rights of different proprietors of separate stories in the same house. It provides that they all contribute to the main walls and roof, each in proportion to the value of his story; and that each makes the floor, under his story, as well as the stairs which lead up to it. Article **532** increases, from one foot to fifteen inches, the thickness of the counter-wall to be built between a privy and a common wall, but diminishes from four feet to twenty-one inches, the thickness of wall required when the neighbour has a well on the opposite side. No counter-wall is however required if the well or privy is at such a distance from the common wall as is prescribed by municipal regulations or by established and recognized usage, or, in default of such regulations or usage, at a distance of three feet. The thickness of the counter-wall to be made when it is intended to build a chimney, a hearth, a stable, or a store for salt or other corrosive substance, against a common wall, or to raise the ground or heap earth against it, is left to be determined by municipal regulations, or established and recognized usage, and in default of these by the courts in each case.

In the title *Of Successions*, most important changes are made.

The many distinctions of property under our old customary law, which were each governed by special rules in matters of succession, and were a source of so much difficulty

and confusion, have been abolished. It matters not under the Code whether property belonging to a succession is moveable or immoveable, *propre* or *acquêt*, or to which of eight different kinds of *propres* it belongs; article **599** considers neither its origin nor its nature, but treats the whole as one inheritance, subject to uniform rules.

As regards the order of succession in the collateral line and the direct line ascending, new rules are established. Thus, under articles **626**, **627**, **628** and **629**, which treat of successions devolving to ascendants, if a person dies without issue, leaving a father or mother, or both father and mother, and also brothers or sisters or their children, one half of his succession falls to the father and mother, or to either of them if the other is dead, and the other half to the collaterals just named. No other collaterals succeed to him, although his father and mother be dead, if he leaves any ascendants whatever; but one half goes to the ascendants of the paternal line, and the other to those of the maternal line. Under articles **631**, **632**, **633** and **634**, which regulate collateral successions, the brothers, or sisters, or nephews and nieces, of a person dying without issue inherit one half of his property, if he leaves a father or mother, and the whole of it, if he does not. If they are the issue of different marriages, the property is divided into two equal portions, those of the whole blood sharing in both portions, and those of the half blood sharing in one portion only. In the event of the deceased person leaving none of the relations above named, but only more distant collaterals and ascendants in one line only, the ascendants and collaterals each take one half. If, in the same case, he leaves no ascendants, then one half falls to the nearest collateral in the paternal line, and the other to the nearest in the maternal line. Beside the above changes a few others also relate to the matter of successions. Thus, article **649** provides that where the heirs of an heir who dies without accepting or renouncing a succession devolved to him, do not agree as to whether such succession shall be accepted or renounced, it is held to be accepted under benefit of inventory. Article **683** declares that, in the collateral line, the beneficiary heir is not excluded by one who accepts unconditionally. This is contrary to the old rule, but it is similar to that which governs successions in the direct line. It is not only more equitable, but has the advantage of establishing a uniformity in respect of both lines. Article **712** applies to all heirs, in whatever line of succession, the rule which formerly governed only heirs in the direct line, or those in the collateral line who were also legatees; so that in all cases the heir must return into the mass of the succession all gifts or legacies made in his favor.

This obligation, however, is not binding when the gift or the legacy contains an express exemption from it. Article 714 extends the provisions of article 712 to donees who at the time of the gift were not heirs, but who, at the time when the succession devolves, are entitled to succeed. Article 728, for the sake of uniformity and convenience, renders general the rule which was formerly exceptional, by declaring that, in all cases, the return of immoveables by the heir who is also a donee or a legatee may, at his option, be made either in kind or by taking less at a valuation.

In the title *Of Gifts inter vivos and by will*, article 833, for the sake of simplicity and uniformity, abolishes the privilege which minors over twenty years of age had, under the old law, of bequeathing certain portions of their property. When the age of majority was twenty-five years, minors between that age and twenty formed a considerable class, in favor of whom exceptional provisions might justly be made, but when the age of majority was fixed at twenty-one years, no sufficient reason remained for preserving an exceptional rule in favor of minors during only one year of their minority. Article 848, in view of the facility with which notaries may now be procured, enacts that, except in the district of Gaspe, where it may still be difficult in many instances to obtain their services, ministers of religion can no longer act as notaries and can only serve as ordinary witnesses. Article 871 contains an amendment which is but a corollary of that contained in the title *Of Obligations* on the subject of defaults (art. 1067.) It provides that in cases where, under the old law, fruits and interest arising from a thing bequeathed would not have accrued until after a judicial demand, they may now date from the time when the debtor of the legacy is put in default. Article 878 declares that universal legatees and legatees by general title, after they have accepted, are personally liable for the debts and legacies imposed upon them by law or by the will, unless they have obtained benefit of inventory; and assimilates their position in other respects to that of the heir. This article however, is rather an interpretation of the old law than the introduction of a change, and is in harmony with a subsequent article (891) which, in the matter of seizin and all the consequent rights and actions, places legatees, by whatever title, in the same position as heirs. Articles 881 and 882 relate to the presumptions resulting from the legacy of a thing which does not belong to the testator. Under the old law such legacies were valid if the testator was aware that the thing did not belong to him, or if the thing belonged to the heir or legatee charged with the payment of it; the presumption being, in either case, that he intended the thing to be procured or the

value of it to be paid in fulfilment of the legacy. As wills, however, are now drawn in ordinary language, and the testator has every facility for giving a clear expression of his intentions, no reason exists for maintaining these presumptions, and according to the two articles just mentioned they are no longer recognized. If, however, the testator, after bequeathing the property of another, should become owner of it, article **883** provides that the legacy will be valid as regards any portion of it remaining in his succession; but any alienation of it by the testator destroys the legacy, even though, by reason of the nullity of such alienation, the property should have returned into his succession. Article **889**, reversing the rule of the old law, declares that, if property bequeathed is hypothecated for a debt due by the testator, the hypothec is borne by the particular legatee. No reason indeed could be given for the former presumption that the testator intended it to be chargeable to his heir or his universal legatee. Article **897** provides that any alienation whatever by the testator, of property by him bequeathed, except when it is both involuntary and void, annuls the legacy; provided his intention to the contrary is not expressed. This is in conformity with the rule of the French Code, which is more simple, and more in accordance with the correct inference from the circumstances, than the rule of the old law, under which forced sales, expropriations for public purposes, and sales urged by pressing necessity formed an exception, and did not annul the legacy. Article **899** declares that heirs cannot be disinherited without all the formalities required for a will. Under the old law the act of exheredation needed only the ordinary notarial form. Under our present system these acts have become useless, inasmuch as a will, disposing of the property to other persons than the one in view, effectually excludes him from the succession; disinheritances have therefore been brought under the same rules as other testamentary dispositions. Articles **905** and **924** supply a deficiency in the old law, by reason of which wills in many instances, could not be executed, as no one but the testator could name testamentary executors. Under these articles the testator may not only name executors, but may provide for the manner in which they shall be appointed or successively replaced, and the courts and judges may appoint them whenever the testator has expressed his intentions to that effect, or whenever an executorship, which the testator intended to continue, has become vacant, and the will makes no provision under which the vacancy can be filled. Article **911** also supplies a deficiency by affording to testamentary executors a means of being relieved from the executorship for sufficient cause. Article **913** facilitates the execution of

wills by providing that in the absence of one or more joint executors from the place, the others may do alone all acts of a conservatory nature, or requiring dispatch. The old law only allowed this to be done when the absence was out of Lower Canada. Article **917** furnishes a remedy which it was doubtful whether the old law afforded. It provides for the removal of testamentary executors who do not or cannot act, or who act improperly. Article **930** declares that substitutions made by other gifts than contracts of marriage may be revoked, so long as they have not opened, unless the substitute has accepted. Formerly, the acceptance required to be more formal than that of gifts in general; but the Code establishes a uniform rule, and any acceptance which would suffice for a gift will be sufficient to prevent the grantor from revoking a substitution. Article **966** settles a point previously doubtful, by deciding that any active or passive debt of the institute, which, in consequence of his accepting as heir or legatee, may be extinguished by confusion, revives between the substitute and the institute, or his heirs, when the substitution opens; except as regards interest up to that time for which confusion still holds.

In the title *Of Obligations*, article **1047** adopts the doctrine of the French Code, as more equitable than the old rule, and declares that when a person, who has received a thing which is not due to him, is in good faith, he is not obliged to restore the profits of it. Article **1064** greatly simplifies the law as regards the degree of care which, under the different classes of contracts, is to be taken of property belonging to others. It abolishes the old distinction of *culpa lata*, *culpa levis* and *culpa levissima*, and establishes the one simple rule for all cases, that the keeper of a thing is bound to bestow all the care of a prudent administrator, (*bon père de famille*). Article **1069** excepts commercial cases from the ordinary rule in matters of default, and subjects them to the more convenient rule of the English law, according to which, when the time of performance is fixed by the contract, the debtor is put in default by the mere lapse of time. Article **1101**, adopting the doctrine of the French Code, reverses the rule of the old law under which one of joint and several creditors might release the debtor from the whole of the debt. It is even more explicit than the article of the Code Napoleon, and leaves no room for the doubts of modern jurists under that code, by declaring that in the case of actual payment alone can the obligation be extinguished by one of the joint and several creditors. Commercial partnerships nevertheless remain subject to their own particular rules. Article **1123**, for greater simplicity and convenience, and with a view of avoiding unnecessary expense, repeals

the old rule under which all the codebtors of a divisible obligation, which could not be performed in parts, had to be joined in the suit brought to enforce the obligation. It will now be sufficient to sue that one of the debtors upon whom the performance of the obligation depends, saving, of course, his recourse against his codebtors. Article **1156** also simplifies the law by declaring that in all cases where subrogation may take place of right and by operation of law, no demand to that effect is necessary. The old rule required a demand in some cases and not in others. Article **1164**, for motives of convenience and equity, provides, that when a debt is payable at the debtor's domicile, notice of his readiness to pay is equivalent to a tender, provided he proves that the money or thing due was ready for payment at the proper time and place. Article **1208** puts an end to the absurdity of making the authenticity of a deed depend on the signature of a second notary who, in practice, whatever may have been the law, never was present at the passing of the act, or even knew the contents of the document. When the contracting parties sign the deed, one notary is now sufficient to give it authencity, and when they do not, the presence and signature of a witness, or of another notary, is required. The article also amends the old law by allowing aliens to be witnesses. Articles **1233**, **1235**, **1236**, and **1237**, whenever the admissibility of oral testimony was formerly limited to cases in which the amount in question did not exceed twenty-five dollars, extend that admissibility by changing the amount to fifty dollars. A similar change has been made in other articles, and it was desirable for the sake of uniformity to make the limitation the same in all such cases. Article **1253**, as a consequence of the change introduced by article 1101, already noticed, declares that the effect of the decisory oath submitted by one of joint and several creditors, is limited to the share of such creditor in the debt, and the debtor cannot by that oath free himself from liability towards the other creditor. This article, however, like article 1101, is subject to the special rule applicable to commercial partnerships.

In the title *Of Marriage Covenants, &c.*, article **1265** simplifies the law by abolishing the *don mutuel*, or mutual gift by which, under the old law, consorts might reciprocally, but only to a limited extent, confer upon each other advantages in the event of survivorship This species of contract had not only fallen into disuse, but the freedom allowed in disposing of property by will had superseded it, by affording consorts a more simple and less restricted means of benefiting each other. Article **1269** enacts that community of property between consorts cannot be stipulated to commence at any other time than from the

day of the marriage. According to Pothier, it might, under the old law, be stipulated that it would commence at any time after the marriage, though not before. The Code has adopted the rule of the modern French law, which is not only more simple and uniform, but more in harmony with the nature of the marriage contract. Article **1397** declares that, without authorization, a wife cannot obligate herself, nor bind the property of the community, even for the purpose of releasing her husband from prison, or of establishing their common children. These two cases were formerly exceptions to the general rule requiring that the wife should be authorized; but as a judicial authorization can always be obtained, even when that of the husband cannot be had, and as there seems to be no reason for dispensing with it, the Code simplifies the law by applying the same rule in every case. Article **1342**, in order to remedy a deficiency in the former law, as well as for the sake of uniformity, requires that the inventory made by a wife, after the death of her husband, to enable her to renounce the community, shall be judicially closed, in the same manner as that prescribed by article 1324 for preventing the continuation of the community between a surviving consort and the children issue of the marriage. The old law required this judicial closing of the inventory in the one case, but omitted to do so in the other, although the same reason called for it in both cases. Article **1380** allows the widow, who renounces the community, to retain out of it the wearing apparel and linen in use for her person, and also her wedding presents. The old law allowed her but one suit of wearing apparel. The change here adopted by the Code renders the rule more consonant with present notions of propriety, without going as far as the French Code, which allows the wife to retain all jewelry whatever. Under this last rule serious injustice might, in many instances, be done to the creditors of the community. Article **1389** requires that in the case of any moveable property being excluded from the community, by a clause of *realization* in the contract of marriage, such property must be established either by an inventory or by some equivalent title. It improves the old law in this, that in default of such inventory or title, which the husband must see to, the latter forfeits his right to take back after the dissolution of the community, such moveable property as accrued to him after marriage, and the wife is allowed to prove, either by titles or by witnesses, or even by common rumor, whatever property of the same kind accrued to her subsequently to the same period.

In the title *Of Sale*, article **1501** declares that when an immoveable is sold with a statement of its superficial contents, whether at a certain rate by

measurement, or at a certain price for the whole, and really contains more or less than the quantity specified, then the buyer, in the one case, is bound to give back or to pay for the excess, and the seller, in the other case, is bound to complete the quantity if possible, or, if this cannot be done, he must make a proportionate reduction in the price. Article **1502** provides, however, that if the difference in quantity is so great as to raise a presumption that the buyer would not have bought had he known it, he may abondon the sale and recover back the price and expenses, and such damages as he may have suffered. Article **1503** excludes from the operation of the two preceding articles all contracts in which it is manifest that a certain determinate thing is sold without regard to measurement. These three articles, which may be considered as one, change the existing law merely in this respect, that for the sake of simplicity and uniformity, as well as for motives of equity, they apply the same rule to the case of excess in quantity when the property has been sold at a single price for the whole, although with a declaration of its contents. The old law in such a case allowed the buyer to have the benefit of the excess in quantity. Article **1519** provides that a purchaser who has unknowingly bought a property charged with a non-apparent servitude, under circumstances which entitle him to vacate the sale, or to claim indemnity, may bring his action for either remedy so soon as he discovers the existence of the servitude. Under the former law his right of action did not accrue until he was disturbed by the exercise of the servitude. The new rule is evidently more just and is moreover analogous in principle with the recent statutory change allowing purchasers of real property to withhold payment of the price, until the removal of such incumbrances as may not have become known to them until after the sale. Article **1544** provides that in sales of moveables, when the buyer fails to take them away, the seller may treat the sale as null, as soon as the delay has expired within which it was agreed to remove them, or if there be no such agreement, then from the time of the buyer's being put in default to do so. Under the old rule a suit at law was necessary in order to give the seller this right, but the wants and usages now existing among us required a more speedy and less expensive remedy.

In the title *Of Lease and Hire*, article **1608** declares that in the case of farms the presumed annual lease, resulting from a holding by sufferance, terminates on the first day of October. This rule is in accordance with the usage of the country, but had been omitted in the statute, by which all such leases, whether of houses or of farms, were made to end on the first of May. Article **1651** provides that, in leases for two or more years, the

lessee shall not be entitled to any reduction of rent, by reason of total or partial loss of harvest caused by fortuitous event or irresistible force. Under the old law, the reduction was proportionate to the loss, which was estimated at the end of the lease, after compensating the harvests of the good years with those of the bad. The new rule is more simple, more easy of application, and less likely to cause litigation. Article **1662** regulates the notice to be given to the lessee by the lessor who, under a stipulation to that effect in the deed, wishes to put an end to the lease in order to occupy the property himself. It was formerly a notice of at least one month; but is now, for the sake of uniformity, assimilated to other notices in cases of lease, and is proportionate to the length of the terms at which the rent is payable. Article **1690**, adopting a provision which has been found to work well in France and which is much needed here to prevent frequent abuses, provides that contractors who undertake to build, according to plans and specifications and at a fixed price, cannot claim any additional sum for extra works, unless such works and their price are specially agreed to in writing by the proprietor.

In the title *Of Loan*, article **1766**, as a corollary of the new rule adopted by article 1064, defines the care which a borrower is bound to bestow upon the thing borrowed to be that of a prudent administrator, and—

In the title *Of Deposit*, article **1802** makes a similar provision with regard to the care which the depositary is bound to bestow upon the thing deposited.

In the title *Of Partnership*, article **1848** declares that when there is no agreement concerning the shares of the partners in the profits and losses of the partnership, they share equally. Under the old law this was the rule in commercial partnerships only, while in other partnerships, a different rule obtained, whenever the value contributed by each partner had been declared. The rule given in this amendment is quite as equitable in ordinary as in commercial partnerships, and its application to both ensures both simplicity and uniformity. Article **1879** corrects a mistake in the statute law, which enacted that in limited partnerships any alteration in the names of the partners was deemed a dissolution of the partnership. This never could have been intended to apply to the names of the special partners, whose shares are mere transferable investments, and the correction is made accordingly.

In the title *Of Life-rents*, article **1906** provides that a rent constituted upon the life of a person who dies within twenty days after the date of the contract is null, and that the money paid for it may be recovered back. The change introduced here consists in fixing at twenty days the period which under the old law was

undetermined. An uncertainty is thus removed which was at least inconvenient, and might in some instances be a cause of litigation. Article **1914** declares that if an immoveable hypothecated for the payment of a life-rent is brought to sheriff's sale, or is sold by a deed of which a confirmation is applied for, the posterior creditors have the choice of either receiving the proceeds upon giving security for the payment of the life-rent, or of allowing the creditor of such rent to be collocated for a sum equal to its value. The provisions of this article are considered more equitable and more convenient than those of the former law which gave the option to the creditor of the rent, by allowing him either to be collocated for its value or to require that the creditors should invest a sufficient amount of the proceeds to produce a like rent, or should give security and be personally liable themselves for the payment of the rent. Article **1915** provides a new and convenient rule for estimating the value of rents. They were formerly valued according to the age and condition of health of the person upon whose life they were constituted, a mode attended with difficulty and uncertainty, and sometimes with considerable expense. The certainty and precision which the system of life-assurances has now attained, and the convenience of the tables prepared by insurance companies for establishing the value of risks upon life, offered a ready mode of establishing the value of life-rents; and this has been done by fixing the value at such a sum as would be sufficient to purchase from a life-assurance company a life-annuity of like amount.

In the title *Of Transaction*, article **1923** enacts that a contract of transaction upon any writing subsequently discovered to be false is null. Under the old law it was null only in so far as it depended upon such writing. The new rule is more equitable and logical for the reason that in transactions all the different clauses depend upon each other, and each is a part of the consideration without which in most cases the transaction would not have been entered into.

In the title *Of Pledge*, article **1971** permits the stipulation by the pledgee that in default of payment, he shall have a right to retain the thing pledged. Such a stipulation, under the old law, was forbidden, and the pledgee could not retain the thing except under the judgment of a court, and at a valuation expressly made for that purpose. The former rule was intended to prevent usurious transactions, but under our law, which allows the stipulation of any rate of interest, there is no longer any reason for the restriction.

In the title *Of Privileges and Hypothecs*, articles **2003** and **2009**, as an equitable restriction in favor of the general mass of the creditors of an estate, limit the privileges for expenses of last illness, when

the disease was of a chronic nature, to those incurred during the last six months before the decease; and, for the same reason, article 2006 limits the privilege of domestic servants and hired persons, upon the moveable property of the debtor, to the wages due for one year, previous to the time of the seizure of the property, or the death of the debtor; while the privilege of clerks, apprentices and journeymen, upon the merchandise and effects contained in the store, shop, or workshop in which their services were rendered, is limited to three months.

In the title *Of Registration of Real Rights*, article 2146, for the sake of simplicity and uniformity, enacts, for all cases, that the memorial to be registered for the preservation of arrears of interest, or rent, must be accompanied with an affidavit of the creditor that the amount is due. This formality was previously required only when the deed was not in authentic form, but there seems to be no reason for any exception in such cases, and the affidavit is now required whether the deed be authentic or not.

In the title *Of Insurance*, article 2548 settles a point upon which different opinions prevailed. It declares that upon an accepted abandonment of a ship, the freight earned after the loss belongs to the insurer of the ship, and that the freight earned previously belongs either to the shipowner, or to the insurer on freight to whom it is abandoned. Some were of opinion that the insurer was entitled to the whole freight, others that he was entitled to none. The Code, as an equitable compromise, adopts the rule of the American law upon the subject.

Ottawa, July, 1866.

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AN ACT

Respecting the Codification of the Laws of Lower Canada relative to Civil matters and Procedure.

(Consolidated Statutes for Lower Canada, Chapter II.)

WHEREAS the laws of Lower Canada in Civil Matters, are mainly those which, at the time of the cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases; and it therefore happens, that the great body of the Laws, in that division of the Province, exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin; and whereas the laws and Customs in force in France, at the period above mentioned, have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them; And whereas the reasons aforesaid, and the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The Governor may appoint three fit and proper persons, Barristers of Lower Canada, to be Commissioners for Codifying the Laws of that division of the Province in Civil Matters, and two fit and proper persons, being also such Barristers, to be Secretaries to the Commission, one of whom shall be a person whose mother tongue is English but who is well versed in the French language, and the other a person whose mother tongue is French but who is well versed in the English language. 20 V. c. 43, s. 1.

2. Any Judge or Judges of the Court of Queen's Bench or of the Superior Court for Lower Canada may be appointed a Commissioner or Commissioners under this Act; and if any such Judge is so appointed, the

Governor may appoint any Barrister of at least ten years standing at the Bar of Lower Canada, to be and act as an Assistant Judge of either of the said Courts,—or any Judge of the Superior Court to be and act as an Assistant Judge of the Court of Queen's Bench, and a Barrister as aforesaid to supply his place as Judge of the Superior Court, as an Assistant Judge thereof,—for and during the time that the Judge, appointed a Commissioner under this Act, continues to be such Commissioner:

2. Every Assistant Judge so appointed shall during the said time, have and exercise all the powers and authority and perform all the duties by law vested in or assigned to a Judge of the Court of which he is appointed an Assistant Judge, as if he had been appointed a Judge of such Court, and shall reside at the place to be named for that purpose from time to time by the Governor; and in case of the vacancy of the office of any such Assistant Judge, another may be appointed in his stead in like manner and with like effect. 20 V. c. 43, s. 2.

3. The said Commissioners and Secretaries shall hold their offices during pleasure, and in cases of vacancy, the Governor may appoint another or others to fill the same, and so on until the work is completed. 20 V. c. 43, s. 3.

4. The said Commissioners shall reduce into one Code, to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature; but they shall not include in the said Code, any of the Laws relating to the Seigniorial or Feudal Tenure. 20 V. c. 43, s. 4.

5. The said Commissioners shall reduce into another Code, to be called the *Code of Civil Procedure of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Procedure in Civil Matters and Cases, and are of a general and permanent character. 20 V. c. 43, s. 5.

6. In framing the said Codes, the said Commissioners shall embody therein such provisions only as they hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest such amendments as they think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are founded. 20 V. c. 43, s. 6.

7. The said Codes shall be framed upon the same general plan, and shall contain, as nearly as may be found convenient, the like amount of detail upon each subject, as the French Codes known as the *Code Civil*, the *Code de Commerce*, and the *Code de Procédure Civile*. 20 V. c. 43, s. 7.

8. The Commissioners shall, from time to time, report to the

Governor their proceedings and the progress of the work entrusted to them, and shall, in all matters not expressly provided for by this Act, be guided by the instructions they receive from the Governor; and whenever they think any section or division of the work sufficiently advanced for the purpose, they shall cause the same to be printed, and transmit a sufficient number of printed copies thereof with their Report to the Governor:

2. And if the Governor in Council thinks it advisable, he shall cause one or more of such copies to be transmitted to each of the Judges of the Court of Queen's Bench and Superior Court for Lower Canada, with a request that he will return the same, with his remarks thereon, by a day to be named in the letter containing such request. *Ibid*, s. 8.

9. Each of the said Judges shall examine the portion of the Commissioners' work so submitted to him, and return the same by the day named as aforesaid, with his remarks, and he shall more especially examine carefully that part of the work purporting to state the Law then in force, and report distinctly his opinion, whether the Law as it then stands is correctly stated therein, and in what paragraph or paragraphs (if any) it is incorrectly stated, with his reasons and authorities, and a draft of the amendments which ought in his opinion to be made in such paragraph or paragraphs, in order that the Law may be correctly stated therein. 20 V. c. 43, s. 9.

10. The Judges or any of them may, in their Report on any portion of the said work referred to them, make suggestions for the amendment of the Law contained in such portion, with the reasons on which such suggestions are founded. 20 V. c. 43, s. 10.

11. At any time when any portion of the said work is before the Judges for their report, they or any of them may confer with the Commissioners or any of them, touching the same; and the Commissioners shall, in any such conference, give all such information and explanation as it is in their power to afford and as the Judges may require, relative to any statement of the Law as it then stands, or any suggestion for its amendmendment, which the Commissioners have made in such portion of their work as aforesaid. 20 V. c. 43, s. 11.

12. The reports of the Judges shall be communicated to the Commissioners, who shall make such corrections in their work as they find advisable after having taken into consideration the reports and suggestions of the Judges; but if any of the Judges do not send in their reports by the day named for that purpose, this shall not prevent the Codes from being completed and submitted to the Legislature as hereinafter provided. *Ibid*, s. 12.

13. The Commissioners shall, from time to time, incorporate,

with the proper portions of the said Codes, such amendments of the actual Law, as the Governor in Council thinks it right to recommend for adoption by the Legislature, after considering the Reports of the Commissioners, and those of the Judges, if any; but such amendments shall be carefully distinguished from the actual Law. *Ibid*, s. 13.

14. When the said Codes, or either of them, are completed, with such amendments as last mentioned, printed copies thereof and of the Reports of the Commissioners, and of the Judges, if any, shall be laid before the Legislature, in order that such Code or Codes may be made Law by enactment; and if it is found advisable that either of the said Codes be completed and submitted to the Legislature before the other, the *Civil Code of Lower Canada* shall be the first so completed and submitted:

2. Either House may propose any amendments to either Code, but such amendments shall be proposed by resolutions which may be passed by one House and sent to the other for its concurrence, and shall be subject to amendment by the other, and to be otherwise dealt with as a Bill might be, until finally agreed to by both Houses, and shall then be communicated to the Commissioners, who shall, with all possible despatch, incorporate the substance of the amendments so agreed to, with the proper Code, which may then be passed as a Bill, at the same or any future session. *Ibid*, s. 14.

15. The said Codes and the Reports of the Commissioners shall be framed and made in the French and English languages, and the two texts, when printed, shall stand side by side. *Ibid*, s. 15.

16. Any two of the Commissioners may make any report or do any other thing which the Commissioners are hereby empowered to do; saving the right of the third Commissioner, if so advised, to make a separate report or enter his dissent and the reasons thereof in the minutes of the proceedings of the Commission. 20 V, c. 43, s. 16.

17. The Commissioners shall be remunerated for their services at such rate as the Governor in Council shall determine, not exceeding sixteen dollars per diem to each Commissioner while employed in the performance of his duties, nor five thousand dollars per annum to any Commissioner; and the said Secretaries shall be remunerated for their services at such rate not exceeding three thousand four hundred dollars per annum, as the Governor in Council shall determine, but the said Secretaries shall give their whole time to the duties of their office. *Ibid*, s. 17.

18. If any Judge of the Court of Queen's Bench or Superior Court for Lower Canada is appointed such Commissioner as aforesaid, he shall, while acting as such, receive no remuneration as Commissioner

except the excess (if any) of the remuneration of a Commissioner over his salary as Judge; and any Assistant Judge to be appointed to supply the place of any such Judge while acting as Commissioner, shall receive a salary to be fixed by the Governor in Council, but not to exceed the highest salary of a Puisné Judge of the Court to which he is appointed; so that the charge upon the Province shall not be increased by the appointment of a Judge or Judges as Commissioners. *Ibid*, s. 18.

19. The Commissioners shall hold their meetings at such place as shall be appointed by the Governor, and the Secretaries shall keep minutes of the proceedings at such meetings. 20 V. c. 43, s. 19.

20. The remuneration to the Commissioners and Secretaries, with such expenses as may be incurred by them for travelling expenses, printing, stationery and other things necessary to the due performance of their duties under this Act, shall be paid by warrant of the Governor, out of the Consolidated Revenue Fund, as shall also the rent of their place of meeting, if such place be not in any public building. *Ibid*, s. 20.

21. All moneys expended under this Act shall be accounted for to Her Majesty and to the Legislature, in the manner provided by law. *Ibid*, s. 21.

sanctionné le 18 sept. 1865

AN ACT

Respecting the Civil Code of Lower Canada.

(29 *Victoria, chapter* 41.)

WHEREAS the Commissioners appointed under the second Chapter of the Consolidated Statutes for Lower Canada, to codify the Laws of that division of the Province in Civil Matters, have completed that portion of their work mentioned in the said Act as the *Civil Code of Lower Canada*, embodying therein such provisions only as they hold to be now actually in force, and giving the authorities on which they believe them to be so, and have suggested such amendments as they think desirable, stating such amendments separately and distinctly, with the reasons on which they are founded; and have in all respects complied with the requirements of the said Act as regards the said Code and amendments; and whereas the said Code with the amendments suggested by the said Commissioners, has, by command of the Governor, been laid before the Legislature, in order that the said Code, with such amendments as may be adopted by the Legislature, may be made law by enactment; and whereas such of the amendments suggested by the Commissioners, and such other amendments as are mentioned in the resolutions contained in the Schedule hereunto annexed, have been finally agreed to by both Houses: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Canada, enacts as follows:

1. The printed roll attested as that of the said *Civil Code of Lower Canada*, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof reported by the Commissioners as containing the existing law without amendment; but the marginal notes, and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected.

2. The Commissioners under the Act mentioned in the preamble of this Act, shall incorporate the amendments mentioned in the resolutions contained in the Schedule to this Act with the said Civil Code as contained in the roll

aforesaid, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

3. The Governor may also select any Acts and parts of Acts passed during the session now last past and the present session, which he may deem it advisable to be incorporated with the said Code, and may cause them to be so incorporated by the said Commissioners, in the manner hereinbefore prescribed with respect to the amendments above mentioned, striking out of the Code or amendments any part thereof inconsistent with the Acts or parts of Acts incorporated therewith.

4. The Commissioners may alter the numbering of the Titles and Articles of the said Code or their order, if need be, and make the necessary changes in any reference from one part of the Code to another, and may correct any misprint or error whether of commission or omission, or any contradiction or ambiguity in the original Roll, but without changing its effect.

5. So soon as the said work of incorporation and correction shall have been completed, the said Commissioners shall cause the Code to be reprinted as amended and corrected, carefully distinguishing in such reprint the substantive amendments and additions made in or to the original Roll, and shall submit the same to the Governor, who may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof; any such marginal notes or references thereon as are mentioned in Section one, being held to form no part thereof, but to be inserted for convenience of reference only.

6. The Governor in Council may after such deposit of the Roll last mentioned, declare by Proclamation the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Civil Code of Lower Canada," and upon, from and after such day the said Code shall be in force accordingly.

7. The laws relating to the distribution of the printed copies of the Statutes shall not apply to the said Code, which shall be distributed in such numbers and to such persons only as the Governor in Council may direct.

8. This Act and the Proclamation mentioned in section six, shall be printed with the copies of the said Code printed for distribution as aforesaid.

9. So much of the Act cited in the Preamble as may be inconsistent with this Act is hereby repealed.

PROVINCE OF CANADA. } MONCK.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, &c., &c., &c.

To all to whom these presents shall come, or whom the same may in any wise concern—GREETING:

GEO. ET. CARTIER, *Atty. Genl.* } WHEREAS in and by a certain Act of the Legislature of the Province of Canada, passed in the twenty-ninth year of Our Reign, intituled: "An Act respecting the Civil Code of Lower Canada," it is amongst other things in effect enacted that the printed roll attested as that of the said *Civil Code of Lower Canada*, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof reported by the Commissioners as containing the existing Law without amendment; but the marginal notes, and the references to existing laws or authorities at the foot of the several articles of said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected; that the Commissioners appointed under the second chapter of the Consolidated Statutes for Lower Canada, to codify the Laws of that Division of the Province in civil matters, shall incorporate the amendments mentioned in the resolutions contained in the Schedule to that Act with the said Civil Code as contained in the roll aforesaid, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments; that the Governor may also select any Acts and parts of Acts passed during the session then last past, and that session, which he may deem it advisable to be incorporated with the said Code, and may cause them to be so incorporated by the said Commissioners, in the manner thereinbefore prescribed with respect to the amendments above mentioned, striking out of the Code or amendments any part thereof inconsistent with the Acts or parts of Acts incorporated therewith; that the Commissioners may alter the numbering of the Titles and Articles of the said Code or

their order, if need be, and make the necessary changes in any reference from one part of the Code to another, and may correct any misprint or error whether of commission or omission, or any contradiction or ambiguity in the original Roll, but without changing its effect; that so soon as the said work of incorporation and correction shall have been completed, the said Commissioners shall cause the Code to be reprinted as amended and corrected, carefully distinguishing in such reprint the substantive amendments and additions made in or to the original Roll, and shall submit the same to the Governor, who may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof; any such marginal notes or references thereon as are mentioned in section one, being held to form no part thereof, but to be inserted for convenience of reference only; and that the Governor in Council may after such deposit of the Roll last mentioned, declare by Proclamation the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Civil Code of Lower Canada," and upon, from and after such day the said Code shall be in force accordingly; AND WHEREAS the said Commissioners have incorporated the amendments mentioned in the resolutions contained in the schedule to the said Act with the said Civil Code as contained in the roll aforesaid, having adapted their form and language to those of the said Code but without having changed their effect, having inserted them in their proper places, and having struck out of the said Code any part thereof inconsistent with those amendments; AND WHEREAS the said Commissioners have been duly directed to incorporate, and have incorporated with the said Code such Acts and parts of Acts, passed during the last two sessions of the Legislature of Canada, as were deemed advisable to be incorporated therewith, and have struck out of the said Code and amendments any part thereof inconsistent with such Acts or parts of Acts so incorporated; AND WHEREAS the said Commissioners have altered the numbering of the Titles and Articles of the said Code and have made the necessary changes in any reference from one part of the Code to another, and have corrected any misprint or error, whether of commission or omission in the original roll, but without changing its effect; AND WHEREAS so soon as the said work of incorporation and correction was completed, the said Commissioners have caused the Code to be reprinted as amended and corrected, having carefully distinguished in such reprint the substantive amendments and additions made in or to

the original Roll and have submitted the same to the Governor of Our said Province of Canada; AND WHEREAS all the provisions of the first five sections of the above Act have been duly carried into effect; AND WHEREAS CHARLES STANLEY VISCOUNT MONCK, being Governor General of Our said Province of Canada, after the provisions contained in the first five sections of the said Act had been as above and in every other particular duly carried into effect, hath caused a correct printed roll of the said Civil Code, attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council; AND WHEREAS Our said Governor General of Our said Province of Canada, after such deposit of the said printed roll of the said Civil Code, hath, by and with the advice and consent of Our Executive Council, for the said Province, fixed the FIRST day of AUGUST next, as the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Civil Code of Lower Canada;" NOW KNOW YE, that by and with the advice of Our Executive Council for the said Province of Canada, We do, by this Our Royal Proclamation, declare that on, from and after the FIRST day of the month of AUGUST next, the said last mentioned Roll attested under the signature of Our said Governor General of our said Province of Canada, countersigned by the Provincial Secretary and deposited in the office of the Clerk of the Legislative Council of the said Province as aforesaid, shall come into force and have effect as law by the designation of "The Civil Code of Lower Canada;" Of all which Our loving subjects of Our said Province, and all others whom these presents may concern, are hereby required to take notice, and to govern themselves accordingly.

IN TESTIMONY WHEREOF, We have caused these our Letters to be made Patent, and the Great Seal of Our said Province of Canada to be hereunto affixed: WITNESS, Our Right Trusty and Well-Beloved Cousin the Right Honorable CHARLES STANLEY VISCOUNT MONCK, Baron Monck of Ballytrammon, in the County of Wexford, Governor General of British North America, and Captain General and Governor in Chief in and over Our Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward, and Vice Admiral of the same, &c., &c., &c. At Our Government House, in Our CITY OF OTTAWA, in Our said Province of Canada, this TWENTY-SIXTH day of MAY, in the year of Our Lord, one thousand eight hundred and sixty-six, and in the Twenty-ninth year of Our Reign.

By Command,

WM. McDOUGALL,

Secretary.

ABBREVIATIONS.

A.

a.—article; articles.
Abbott,—Abbott on Shipping.
A. D.—Ancien Denizart.
al.—alinéa.
Alau. — Alauzet, Des Assurances.
Alnutt, P. W.—Alnutt, Practice of Wills.
Ang. Ins.—Angell, on Life and Fire Insurance.
a. pr.—article préliminaire.
Arg.—Argou.
Arn.—Arnould, on Insurance.
Arn. Corp.—Arnold on Corporations.
Arr.—Arrêt; Arrêtés.
" C. S.—Arrêt du Conseil Supérieur.
" de Boni.—Arrêts de Boniface.
" Lam. — Arrêtés de Lamoignon.
" P. P.—Arrêt du Parlement de Paris.
Ass.—Assurance.
Aug.—Augeard.
Auth. or Author.—Authorities.

B.

b.—book.
B.—Bills.
Ba. Ab.—Bacon's Abridgment.
Bac. D. J. — Bacquet, Droits de Justice.
Bar.—Bartolus.
Bard.—Bardet.
Bas.—Basnage.
Bav. & L.—Bavoux et Loiseau, Jurisprudence du Code Civil.
Bay. B.—Bayley on Bills.
B. d'Arg.—Boucher d'Argis.
Beaub. — Beaubien, Lois du Canada.
Beawes—Beawes, Lex Mercatoria.
Béc. Q.—Bécane, Questions sur le Droit Commercial.
Bell, Com.—Bell's Commentaries.
Ben. — Benecke, Principles of Indemnity.
Bi.—Biret.
" Exp. — Biret, Explication du Code.
Bing. N. C.—Bingham's New Cases.
Bio.—Bioche, Dictionnaire de Procédure.
Bl.—Blois.
Bla.—Blackstone's Commentaries.
Boi. — Boileux, Commentaires sur le Code Civil.
Boic.—Boiceau.
Bon.—Bonnier.
Boni. (Arr. de)—Arrêts de Boniface.
Bor.—Bornier.
Bosq. — Bosquet, Dictionnaire des droits domaniaux.

Bouch. — Boucheul, Bibliothèque.
Boud.—Boudousquié.
Bouh.—Bouhier.
" C. B.—Bouhier, Coutume de Bourgogne.
Boul. Stat.—Boullenois, Des Statuts.
" Dissert.—Boullenois, Dissertations.
Bou.-Pat.—Boulay-Paty, Droit Commercial.
Bour.—Bourjon,
Bous.—Bousquet.
Bout.—Boutaric.
Boutil. S. R.—Boutillier, Somme Rurale.
B. R.—Bail à Rente.
Bret. H.—Bretonnier sur Henrys.
" Q.—Bretonnier, Questions de Droit.
Bril.—Brillon.
Bur.—Burge.
Byles—Byles on Bills.

C.

c.—chapter.
C.—Civi Code of Lower Canada.
C. A. } Coutume d'Anjou.
C. Anj. }
Cad.—Cadrès.
Cap. Charl.—Capitulaires de Charlemagne.
" Louis Déb.—Capitulaires de Louis le Débonnaire.
Car.—Carondas.
" Rep.—Carondas, Réponses.
Cas.—Casarégis, Discours.
Cat.—Catellan.
C. B.—Coutume de Bourgogne.
C. Bourb.—Coutume de Bourbonnais.
C. Br.—Coutume de Bretagne.
C. Co.—Code de Commerce.
C. C. V.—Code du Canton de Vaud.
Ch.—Change.
Chab.—Chabot.
Chalm. Op.—Chalmer's Opinions of Eminent Lawyers.
Champ. et Rig. — Championnière et Rigaud.
Char.—Chardon.
Chau.—Chaudon.
Che.—Chenu.
Chep.—Cheptels.
Chit. B.—Chitty on Bills.
" Co. L.—Chitty on Commercial Law.
" Con.—Chitty on Contracts
" Cr. L.—Chitty on Criminal Law.
" Pr.—Chitty on Prerogative Law.
Chit. & H.—Chitty and Hulme.
cit.—citations.
Cho.—Chopin.
Christie, P. W.—Christie, Precedents of Wills.
C. L.—Civil Code of Louisiana.
Clam.—Clamageran.
Cleirac, O. H.—Cleirac, Ordonnances Hanséatiques.
" U. C. M.—Cleirac, Us et Coutumes de la Mer.
C. N.—Code Napoléon.
C. Nor.—Coutume de Normandie.
C. O.—Coutume d'Orléans.
Coch. Pl.—Cochin, Plaidoyers, (Edition 1821.)
Cod.—Codex Justianus.
col.—column.
Coll. Part.—Collyer on Partnerships.
Com.—Comyn.
" (following the name of an author).—Communauté.
Con.—Contracts.
Conf. du C.—Conférences du Code.
cons.—consequence.

Cons. de M.—Consulat de la Mer.
cont.—*contrà*.
Coq.—Coquille.
Cou.—Couchot.
C. P.—Coutume de Paris.
C. R.—Constitution de Rente.
C. R. S.—Code of Roman States.
C. S.—Code Sarde.
C. S. C.—Consolidated Statutes of Canada.
C. S. L. C.—Consolidated Statutes for Lower Canada.
Cub.—Cubain.
Cug. Cugnet.
Cuj.—Cujas.

D.

D.—Dard.
Dag. Pl.—Daguesseau, Plaidoyers.
Dal.—Dalloz.
" D.—Dalloz, Dictionnaire.
" J. G.—Dalloz, Jurisprudence Générale.
" R. J.—Dalloz, Receuil de Jurisprudence.
Danty, — Danty, Preuve par témoins.
Darg. C. B.—Dargentré, Coutume de Bretagne.
Dar. Inj.—Dareau, Injures.
Del.—Déclaration.
déf.—définition.
Delh.—Delhommeau.
De L'H.—De L'Hommeau.
Dels.—Delsol.
Delv.—Delvincourt.
Delv. Dr. C.—Delvincourt, Droit Commercial.
Dem.—Demante.
Demo.—Demoly.
Demol.—Demolombe.
Dén. Ac. de Notor.—Denizart, Actes de Notoriété.
Dép.—Dépôt.
Desg.—Desgodets.
Desp.—Despeisses.
De V. & Gil.—De Villeneuve & Gilbert.
De Vil. D. C. C.—De Villeneuve, Dictionnaire du Contentieux Commercial.
dist.—distinction.
D'Ol.—D'Olive.
Dom.—Domat.
Don.—Donations entre vifs.
" M. — Donations entre Mari et Femme.
Dou.—Douaire.
Dou. Can. Abs.—Doucet, Canadian Abstract.
Dowd. Ins.—Dowdswell, Insurance (F. & L.)
Drapier, — Drapier, sur les Dixmes.
Drion,—Drion, du Notaire en Second.
Duer,—Duer, on Insurance.
Dum.—Dumoulin.
" M.—Dumoulin, Coutume du Maine.
" P—Dumoulin, Coutume de Paris.
Dun.—Dunod, Prescriptions.
Dup.—Dupérier.
Dupl. C. P.—Duplessis, sur la Coutume de Paris.
Dur.—Duranton.
Duv.—Duvergier.

E.

E.—Edit.
East.—East's Reports.
ed.—edition.
Ed. & O.—Edits et Ordonnances.
e. l.—*eodem loco*.
Ellis, —Ellis, Life and Fire Insurance (Shaw's.)
Em.—Emérigon.
Em. (Bou.-Pat). — Emérigon, par Boulay-Paty.

Ency.—Encyclopédie de Droit.
" Absent (*e. g.*)—Encyclopédie, *verbo* Absent.
Ersk. Inst.—Erskine's Institutes.
e. t.—*eodem titulo.*
et. pas.—*et passim.*
e. v.—*eodem verbo.*

F.

ff.—Digestum Justiniani.
Fa.—Favre.
Fav.—Favard.
" de Lang. — Favard de Langlade.
F. C. P.—French Code of Civil Procedure.
Fen.—Fenet.
" Poth.—Pothier par Fenet.
" T. P.—Fenet, Travaux Préparatoires.
Fer. C. P.—Ferrière, Coutume de Paris
" D.—Ferrière, Dictionnaire de Droit.
" G. C.—Ferrière, Grand Coutumier.
Flan.—Flanders or Shipping.
Fœl.—Fœlix (Demangeat).
" H.—Fœlix et Henrion.
fol.—folio.
Fost.—Foster.
Four. S.—Fournel, Traité de la Séduction.
" V.—Fournel, Voisinage.
Frém.—Fréminville.
Fur.—Furgole.

G.

Gin. — Gin, Analyse du Droit Français.
Gir. L. C.—Girouard, Lettres de Change.
gl.—glose.
Glf. Ev.—Greenleaf on Evidence.
Gou.—Gousset, Code Civil.
Gow, — Gow on Partnership (3d ed.)
Grant, Corp.—Grant on Corporations.
Grav. L.—Graverol sur Laroche.
Gr. C.—Grand Coutumier.
Gren. Hyp.—Grenier, Hypothèques.
Gren. on E.—Grenier, sur Edit de 1771.
Guen.—Guenois, Recueil d'Ordonnances.
Guidon—Le Guidon de la Mer.
Guy.—Guyot, Répertoire.
" Absent (*e. g.*)—Guyot, Répertoire, *verbo* Absent.
Guyp.—Guypape.

H.

Halifax, A. C. L. — Halifax, Analysis of Civil Law.
Ha. P. C.—Hale, Pleas of the Crown.
Hein.—Heineccius.
Hen.—Henrys.
Henn.—Hennequin.
Her. — Héricourt, Vente des Immeubles.
h. t.—*hoc titulo.*
Hou. — Houyvet, Ordre des créanciers.
Hyp.—Hypothèques.

I.

Ib.—*Ibidem.*
Id.—*Idem.*
i. f.—*in fine.*
Imb.—Imbert, Pratique Judiciaire.
Ind. to Stat.—Index to Statutes.
Inf. à *fort.*—Inference à *fortiori.*
Ins.—Insurance.

Ins. sur Conv. — Instructions faciles sur les Conventions.
Inst. — Institutiones Justiniani.
Intr.—Introduction; Introduction Générale aux Coutumes.
i. p.—*in principio.*
I. S.—Imperial Statute.
Isam.—Isambert.
i. v.—*iisdem verbis.*

J.

J. A.—Journal des Audiences.
Jarman,—Jarman on Wills.
J. Oléron,—Jugements D'Oléron.
Jones, Bts.—Jones, Bailments.
J. P.—Journal du Palais.
Jou. A. J.—Jousse, Administration de la Justice,
" O.—Jousse, Ordonnance.
Jouy, Pr. des Dixmes.—Jouy, Principes des Dixmes.

K.

Kt.—Kent's Commentaries.

L.

l.—*liber ;* livre.
L. Mar.—Louage, Maritimes.
L. & B.—Louet & Brodeau.
L. & B. C. P.—Louet & Brodeau, Coutume de Paris.
Lac.—Rousseau de Lacombe.
Lah.—Lahaie.
Lal.—Lalaure.
Lam. M. — Lamoignon, Mémoires.
" Arr.—Arrêtes de Lamoignon.
Lan.—Lange.
Lap.—Lapeyrère.
Lar.—Laroche.
Lau.—Laurière.
l. c.—*loco citato.*
L. C. J.—Lower Canada Jurist.
L. C. R.—Lower Canada Reports
Leb.—Lebrun.
Lebret, S.—Lebret, de la Souveraineté.
Lem.—Lemaître.
Lep.—Lepage.
Lepr.—Leprestre.
let.—letter.
Levi,—Levi, Commercial Law.
Lew. Mar.—Lewis, on Marriage.
Lo.—Locré.
" E. C.—Locré, Esprit du Code.
" L. C.—Locré, Législation Civile.
Loi. I. C.—Loisel, Institutes Coutumières.
Lor.—Lorieux.
Loui. R. (O. S.) — Louisiana Reports (Old Series.)
Lovelass, W. — Lovelass on Wills.
Loy. Seign. — Loyseau, Des Seigneuries.
" Of.—Loyseau, Des Offices.

M.

Mac.—Maclachlan.
Magens. — Magens on Insurance.
Mal.—Maleville.
Man.—Manuel de Paillet.
Mand.—Mandat.
Mar.—Mariage.
Marc.—Marcadé.
Marsh. — Marshall, on Insurance.
Mas.—Massol.
max.—maxim.
May.—Maynard.
Men.—Menochius.
Merc. de tut. — Mercier, De tutelis.

Merl.—Merlin, Repertoire.
" Absent (*e. g.*)—Merlin, Répertoire, *verbo* Absent.
" Q.—Merlin, Questions de Droit.
Mes.—Meslé.
Mil.—Millet.
Mol.—Molloy.
Mont.—Montvallon.
Mor.—Mornac.
Month.—Montholon.
M. S. A.—The Merchant Shipping Act, 1854.

N.

n. — note.
n. — number (often omitted, particularly with Pothier.)
Nan.—Nantissement.
N. D.—Nouveau Denizart.
N. Fer.—Nouveau Ferrière.
N. Pi.—Nouveau Pigeau.
Nou.—Nouguier.
Nov.—Novellæ.

O.

O.—Ordonnance.
Ob.—Obligations.
O. Bl.—Ordonnance de Blois.
obs.—observation.
O. C.—Ordonnance du Commerce.
O. D.—Ordonnance des Donations.
O. E. F.—Ordonnance des Eaux et Forêts.
O.F.—Ordonnance de Fontanon.
O. H.—Ordonnances Hanséatiques.
Oli.—Oliphant on Racing.
O. M. — Ordonnance de la Marine.
O. Mou.—Ordonnance de Moulins.
O. O.—Ordonnance d'Orléans.
Ort.—Ortolan.
O. S.—Ordonnance des Substitutions.
O. T.—Ordonnance des Testaments.
O. W.—Ordonnances de Wisbuy.

P.

p.—page, or pages; (is omitted in most cases.)
Pa. Ag.—Paley on Agency.
Pa. P. & A.—Paley, Principal and Agent.
Pail.—Paillet, Manuel de Droit Français.
Pand.—Pandectes.
Pap. Arr.—Papon, Arrêts.
Par.—Pardessus, Droit Commercial.
Pars. M. L.—Parsons, Mercantile Law.
" W.—Parsons on Wills.
P. C.—Procédure Civile.
Per. E. C. S.—Perrault, Extraits du Conseil Supérieur.
" E. P. Q.—Perrault, Extraits de la Prévosté de Québec.
Perrin.—Perrin, Code des Constructions.
Pers.—Personnes.
Pet.—Petersdorff.
P. Fr.—Pandectes Françaises.
Ph.—Phillips, Insurance.
P. & H.—Priviléges et Hypothèques.
P. Mar.—Puissance Maritale.
Pi.—Pigeau, Procédure Civile.
Poc.—Pocquet de Livonnière.
Pos.—Possession.
Poth.—Pothier.
" Ass. — Pothier, Assurance.
" B. R.—Pothier, Bail à Rente.
" Ch.—Pothier, Change.

Poth. Chep. — Pothier, Cheptels.
" Choses—Pothier, Choses.
" C. O. Com. (*e. g.*)—Pothier, Coutume d'Orléans, Introduction au Titre de la Communauté.
" Com. — Pothier, Communauté.
" C. R.—Pothier, Constitution de Rente.
" Dép.—Pothier, Dépôt.
" Don.—Pothier, Donations entre vifs.
" Don. M.—Pothier, Donations entre mari et femme.
" Dou. — Pothier, Douaire.
" Hyp. — Pothier, Hypothèques.
" Intr. — Pothier, Introduction générale aux Coutumes.
" Jeu,—Pothier, Jeu.
" L. Mar.—Pothier, Louages Maritimes.
" Lou.—Pothier, Louage.
" Mand.—Pothier, Mandat.
" Mar. — Pothier, Mariage.
" Nan.—Pothier, Nantissement.
" Ob. — Pothier, Obligations.
" Pand. — Pothier, Pandectes.
" P. C.—Pothier, Procédure Civile.
" Pers.—Pothier, Personnes.
" P. Mar.—Pothier, Puissance Maritale.
" Pos.—Pothier, Possession.
" Pres. — Pothier, Prescription.
" Prêt C.—Pothier, Prêt de Consomption.
" Prêt U.—Pothier, Prêt à Usage.
" Pr. G. A.—Pothier, Prêt à la Grosse Aventure.
" Prop. — Pothier, Domaine de Propriété.
" Soc.—Pothier, Société.
" Sub.—Pothier, Substitutions.
" Suc.—Pothier, Successions.
" Test. — Pothier, Donations testamentaires.
" Vente—Pothier, Vente.
P. Poul.—Du Parc Poulain.
pr. (a.)—préliminaire (article.)
Pr. de la Jan.—Prevôt de la Jannès.
Pres.—Prescription.
Pro. C. N. — Projet du Code Napoléon.
Prop.—Propriété.
Proud.—Proudhon (Valette.)
" C. D. F. — Proudhon, Cours de Droit Français.
" D. P.—Proudhon, Domaine de Proprieté.
pt.—part; partie.
P. V. C.—Procès Verbal des Conférences.

Q.

Q.—Questions.
q.—question, questions.
Quen.—Quenault, Assurances.

R.

r.—règle; rule.
Rav.—Raveau.
Ravi.—Raviot.
R. de Vil. — Rolland de Villargues.
R. Lyon.—Règlement de Lyon.
Ren.—Renusson.

Ren. Subr.—Renusson, Subrogation.
Rep.—Répertoire.
Rev.—Revue de Législation et de Jurisprudence du Bas Canada.
Ric.—Ricard.
Rich.—Richer.
Riv.—Rivière.
R. J.—Recueil de Jurisprudence (Dalloz.)
Rod.—Rodier.
Rodi.—Rodière.
Rog.—Rogron.
Ros. B.—Roscoe on Bills.
Rus. Cr.—Russell on Crimes.
R. Wol.—Revue Wolowski.

S.

s.—section.
Sal.—Sallé.
" C. des Curés.—Sallé, Code des Curés.
Salv.—Salviat.
Salvaing, U. F.—Salvaing, Usage des Fiefs.
Sav.—Savigny.
Savary, P.—Savary, Parères.
" " 39 (*e. g.*)—Savary, Parères, Parère 39.
" P. N.—Savary, Parfait Négociant.
Sedg.—Sedgwick, on Measure of Damages.
Ser.—Serres.
Serp.—Serpillon.
Sm. Con.—Smith on Contracts.
" M. L.—Smith, Mercantile Law.
Soc.—Société.
Soe.—Soefve.
Sol.—Solon.
som.—sommaire.
Stair, Inst.—Stair, Institutes.
Steph.—Stephen's Commentaries.
Stev.—Stevens, on Average.
Sto. Ag.—Story, on Agency.
" B. N.—Story on Bills of Exchange.
" Bts.—Story on Bailments.
" Con.—Story on Contracts.
" Conf.—Story on Conflict of Laws.
" Part.—Story on Partnership.
" P. N.—Story on Promissory Notes.
Str.—Straccha, de navibus.
St. Rep.—Stuart's Reports.
Sub.—Subrogation.
Suc.—Successions.
Sug. V. P.—Sugden, Vendors and Purchasers.
sup.—*suprà*.

T.

Tay.—Taylor, on Evidence.
Test.—Testaments.
Teu. et Sul.—Teulet et Sulpicy, Codes Français.
Thev.-Des.—Thévenot-Dessaules, Dictionnaire Du Digeste.
Tom.—Tomlin's Law Dictionary.
" Treason (*e. g.*)—Tomlin's Law Dictionary, *verbo* Treason.
Toub.—Toubeau
Toul.—Toullier.
Tr.—Troplong.
" P. & H.—Troplong, Priviléges et Hypothèques.
t. t.—*toto titulo*.
Tud.—Tudor, Mercantile Law.

V.

v.—for *verbo*, is generally omitted.
V.—Victoria.

Va.—Valin.
" O. M.—Valin, Ordonnance de la Marine.
" Ass.—Valin, sur l'Ordonnance de la Marine, titre Des Assurances.
Vaz.—Vazeille.
v. c.—*verbo citato*, or *verbis citatis*.
Vin. Q. S. — Vinnius, Quæstiones Selectæ.
" in Pek.—Vinnius in Pekium.
Voet, P.—Voet ad Pandectas.

W.

Wat. Part.—Watson, Partnership.
Weatherly G. P.—Weatherly, Guide to Probate.
Whar.—Wharton's Law Lexicon.
Woolrich, C. L. — Woolrich, Commercial Law.

Z.

Zach.—Zachariæ.

The abbreviations of the Latin titles of the Institutes, Digest, Code, or Novellæ, are not included in the above List, as their meaning may readily be found with the assistance of the Alphabetical Tables of the *Corpus Juris Civilis*.

NOTE.

The dash "—", in the text of the articles, indicates the beginning of a paragraph.

Two hyphens "- -", after the number of a page, or other reference, mean: "and following."

The numerals and figures between brackets, at the end of each article, refer to the volume and page of the Draft as finally reported by the Commissioners.

CIVIL CODE

OF

LOWER CANADA.

PRELIMINARY TITLE.

OF THE PROMULGATION, DISTRIBUTION, EFFECT, APPLICATION, INTERPRETATION AND EXECUTION OF THE LAWS IN GENERAL.

1. Acts of the imperial parliament which affect Canada are deemed to be promulgated and come into force from the day on which they receive the royal assent, unless some other time is therein appointed.—1 Bla. 102-107; 1 Chit. Cr. L. 638; 1 P. Fr. 407; Chalm. Op. 158, 228, 231, 292, 511; C. N. 1. [I. 243.]

2. The acts of the provincial parliament are deemed to be promulgated:

1. If they be assented to by the governor, from the date of such assent;

2. If they be reserved, from the time at which the governor makes known, either by proclamation, or by speech or message to the legislative council and assembly, that they have received the royal assent.—C. S. C. c. 5, s. 4; Union Act, s. 38, 39; 1 P. Fr. 407, p. XXVI.; C. S. L. C. c. 3, s. 1; C. N. 1. [I. 243.]

3. Any provincial act assented to by the governor, ceases to have force and effect from the time at which it is announced, either by proclamation, or by speech or message to the legislative council and assembly, that such act has been disallowed by Her Majesty, within the two years following the reception, by one of her principal secretaries of state, of the authentic copy which has been transmitted to him of such act.—Union Act, s. 38. [I. 243.]

4. An authentic copy of the statutes assented to by the gov-

NOTE.—The changes and additions made in virtue of the statute of 1865, intituled: *An Act respecting the Civil Code of Lower Canada*, and contained in the Schedule of Resolutions appended to the said statute, are, in this Code, inserted between brackets [].

ernor, or the assent to which has been published as provided in article 2, is furnished by the clerk of the legislative council to Her Majesty's printer, whose duty it is to print and cause to be distributed, to all entitled thereto, the number of copies mentioned in the list transmitted to him by the provincial secretary, after the close of each session. C. S. C. c. 5, s. 7. [I. 243.]

5. The persons entitled to such distribution are :—The members of both houses of parliament, and the public departments, administrative bodies and public officers mentioned in the said list.—Ib. s. 8, 9. [I. 243.]

6. The laws of Lower Canada govern the immoveable property situate within its limits.—1 Fœl. n. 60 -- ; 1 Marc. n. 75 ; 1 Boul. 7, 26 -- ; Poth. Intr. n. 22, 23 -- ; 1 Toul. n. 119 ; C. N. 3. [I. 243.]

Moveable property is governed by the law of the domicile of its owner. But the law of Lower Canada is applied whenever the question involved relates to the distinction or nature of the property, to privileges and rights of lien, contestations as to possession, the jurisdiction of the courts and procedure, to the mode of execution and attachment, to public policy and the rights of the crown, and also in any other cases specially provided for by this code.—1 Fœl. n. 61 ; 1 Boul. 8, 338, 339 ; Poth. Intr. n. 24 ; 1 Toul. n. 117 ; 1 Marc. 56 ; 5 P. Fr. 35, 6 ; 1 Dur. n. 99 ; 18 Merl. 432 ; 1 Rog. 7 ; 1 Zach. 38 ; 1 Dels. 24 ; 1 Proud. 98 ; Lah. 2, on a. 3 ; Riv. 25 ; 1 Prev. de la Jan. LXXXIII ; Dem. 8 ; 1 Demol. n. 94 ; Cub. 412, 3 ; 8 Sav. 169, 173. [I. 245.]

The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there ; subject, as to the latter, to the exception mentioned at the end of the present article.—1 Toul. n. 113 -- ; 1 Zach. 36, 37 ; 1 Fœl. 19, 62. [I. 245.]

An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons ; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.—1 Toul. n. 114, 115 ; 1 Zach. 37 ; 1 Fœl. 58 ; 1 Boul. 147, 152 ; 1 Mal. 10. [I. 245.]

7. Acts and deeds made and passed out of Lower Canada are valid, if made according to the forms required by the law of the country where they were passed or made.—Dom. l. prel. t. 1, § 2, n. 20 ; Poth. Intr. c. 1, n. 6, 7 ; D. 2, cit. ; Lah. 2 ; C. N. 3 ; C. L. 9. [I. 245.]

8. Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place ; in any of

which cases, effect is given to such law, or such intention expressed or presumed.—1 Fœl. 80 -- ; 1 Toul. n. [I. 245.]

9. No act of the legislature affects the rights or prerogatives of the crown, unless they are included therein by special enactment.

The rights of third parties, who are not specially mentioned in any such act, are likewise exempt from the effect thereof, unless the act is public and general.—C. S. C. c. 5, s. 6, § 25. [I. 245.]

10. An act is public, either by its nature or by its being so declared. All other acts are private.

All persons are bound to take cognizance of public acts ; but private acts must be pleaded. —Ib. § 27. [I. 245.]

11. A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.—ff. L. 12 De leg. ; Dom. l. prel. t. 1, s. 2, n. 9-24 ; C. S. L. C. c. 82, s. 1 ; 1. P. Fr. 424 -- ; 1 Lo. E. C. 213, 214 ; 1 Dur. n. 95, 100 ; D. 2, a. 4 ; C. N. 4 ; C. L. 21. [I. 245.]

12. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed.

The preamble, which forms part of the act, assists in explaining it.—C. S. C. c. 5, s. 6, § 28 ; C. S. L. C. c. 82, s. 1. [I. 247.]

13. No one can by private agreement, validly contravene the laws of public order and good morals.—Poth. Ob. n. 15 ; Merl. Loi, n. 43, § 8 ; Lah. 4 ; C. N. 6 ; C. L. 11. [I. 247.]

14. Prohibitive laws import nullity, although such nullity be not therein expressed.—Cod. L. 5, De leg. l. 1, t. 14 ; 1 Toul. n. 90 ; 1 Bouh. 390 ; C. L. 12. [I. 247.]

15. The word "shall" is to be construed as imperative, and the word "may" as permissive. —C. S. L. C. c. 1, s. 13, § 3.

16. Penalties, confiscations and fines incurred for contraventions of the laws, are recoverable, unless it is otherwise specially provided, by ordinary process of law, in the name of Her Majesty, alone, or jointly with another prosecutor, before any court having civil jurisdiction to the amount sought to be recovered, except only the Commissioners' Courts for the summary trial of small causes, which are prohibited from taking cognizance of these cases.— C. S. C. c. 5, s. 6, § 17 ; C. S. L. C. c. 94, s. 8. [I. 247.]

17. The words, terms, expressions and enactments enumerated in the following schedule, wherever used in this code or in any act of the provincial legislature, have the meaning and application respectively assigned to them in such schedule, and are interpreted in the manner therein specified, unless there is some special enactment to the contrary.

SCHEDULE.

1. Each of the expressions "Her Majesty," "the King," "the Sovereign," "the Queen," "the Crown," means the king

or the queen, his or her heirs and successors, sovereigns of the United Kingdom of Great Britain and Ireland.—C. S. C. c. 5, s. 6, § 1. [I. 247.]

2. The words "imperial parliament" mean the parliament of the United Kingdom of Great Britain and Ireland; the words "imperial acts or statutes" mean the laws passed by that parliament, and the words "act" and "statute," whenever they are made use of in this code, without qualification, mean the acts and statutes of the parliament of Canada. By the words "provincial parliament" is understood the parliament of Canada, and the words "provincial acts or statutes" mean the laws passed by that parliament. [I. 247.]

3. The words "governor," "governor of this province," "Governor General," or "Governor in Chief," mean the governor, lieutenant-governor or the person administering the government of this province.—C. S. C. c. 5, s. 6, § 2. [I. 249.]

4. "Governor in Council" means the governor, lieutenant-governor, or the person administering the government, acting with the advice of the executive council of this province.—Ib. § 3. [I. 249.]

5. The word "proclamation" means proclamation under the great seal; and by "great seal" the great seal of the province of Canada is understood.—C. S. L. C. c. 1, s. 13, § 6. [I. 249.]

6. "Lower Canada" means all that part of the province of Canada which, previously to the union, constituted the province of Lower Canada; and "Upper Canada" that part which, at the same time, constituted the province of Upper Canada.—C. S. C. s. 6, § 4, 5. [I. 249.]

7. The words "The United Kingdom" mean the United Kingdom of Great Britain and Ireland; and "The United States," the United States of America.—Ib. § 6. [I. 249.]

8. The name commonly given to a country, place, body, corporation, society, officer, functionary, person, party or thing, designates and means the country, place, body, corporation, society, officer, functionary, person, party or thing thus named, without the necessity of more ample description.—Ib. § 6. [I. 249.]

9. The masculine gender includes both sexes, unless it appears by the context that it is only applicable to one of them.—Ib. § 7. [I. 249.]

10. The singular number extends to more than one person, or more than one thing of the same sort, whenever the context admits of such extension.—Ib. [I. 249.]

11. The word "person" includes bodies politic and corporate, and extends to heirs and legal representatives, unless such meaning is contrary to law or inconsistent with the particular circumstances of the case.—Ib. § 8. [I. 249.]

12. The words "writing," "written," or terms of like import, include words printed, or otherwise traced or copied.—Ib. § 9. [I. 249.]

13. The word "month" means a calendar month.—Ib. § 11; Sto. B. E. 379; 2 Whar. 656. [I. 249.]

14. By "holidays" are understood the following days: Sundays, New Year's Day, the Epiphany, the Annunciation, Good Friday, the Ascension, *Corpus-Christi*, the festival of St. Peter and St. Paul, All Saints' Day, Christmas Day and any other day fixed by proclamation as a day of general fast or thanksgiving; saving the special provisions established by the statutes concerning the collection of the revenue and the payment of bills of exchange and promissory notes.—C. S. C. c. 5, s. 6, § 12; c. 16, s. 16; c. 57, s. 5; C. S. L. C. c. 64, s. 32. [I. 249; III. 373.]

15. The word "oath" includes the solemn affirmation which certain persons are permitted to make instead of an oath.—C. S. C. c. 5, s. 6, § 13; C. S. L. C. c. 34, s. 8; c. 82, s. 13. [I. 249.]

16. The word "magistrate" means a justice of the peace. "Two justices of the peace" means two or more justices sitting or acting together. When any thing is ordered to be done by or before a justice of the peace, magistrate, functionary or public officer, one is understood whose powers or jurisdiction extend to the place where such thing ought to be done. The authority given to do a thing, carries with it all the powers necessary for that purpose.—C. S. C. c. 5, s. 6, § 20. [I. 249.]

17. The right of nominating to an office or employment carries with it that of removal.—Ib. § 22. [I. 249.]

18. The duties imposed and the powers conferred upon an officer or public functionary, in his official capacity, pass to his successor, and pertain to his deputy in so far as they are compatible with the charge of the latter.—Ib. § 23; C. S. L. C. c. 77, s. 16. [I. 249.]

19. When an act is to be performed by more than two persons, it may be validly done by the majority of them, except in the cases otherwise specially provided.—C. S. C. c. 5, s. 6, § 24; C. S. L. C. c. 1, s. 13, § 5. [I. 249.]

20. The pound sterling is equivalent to the sum of four dollars, eighty-six cents and two thirds, or one pound, four shillings and four pence, currency. The "sovereign" is of like value.—C. S. C. c. 15, s. 4; C. S. L. C. c. 82, s. 3. [I. 249.]

21. By the terms "inhabitant of Lower Canada" is meant a person having his domicile in that part of the province.

22. The terms "acts of civil status" mean the entries made in the registers kept according to law, to establish births, marriages and burials.

"Registers of civil status" are the books so kept and in which such acts are entered.

"Officers of civil status" are those intrusted with the keeping of such registers.

23. By "bankruptcy" is meant the condition of a trader who has discontinued his pay-

ments.—2 Bor. O. 1673, 666; Guy. Faillite, 273; Bon. 726, p. 312; Par. n. 1091; 1 Delv. D. C. 242. [I. 249.]

24. A fortuitous event is one which is unforeseen, and caused by superior force which it was impossible to resist. [III. 373.]

BOOK FIRST.

OF PERSONS.

TITLE FIRST.

OF THE ENJOYMENT AND LOSS OF CIVIL RIGHTS.

CHAPTER FIRST.

OF THE ENJOYMENT OF CIVIL RIGHTS.

18. Every British subject is, as regards the enjoyment of civil rights in Lower Canada, on the same footing as those born therein, saving the special rules relating to domicile.—Capit. of Queb. 1759; Treaty of St. Germain 1763; C. N. 8. [I. 251.]

19. The quality of British subject is acquired either by right of birth, or by operation of law.—C. S. C. c. 6, s. 4; 1 Dur. 120; C. N. 7. [I. 253.]

20. A person born in any part of the British empire, even of an alien, is a British subject by right of birth, as also is he whose father or grandfather by the father's side is a British subject, although he be himself born in a foreign country; saving the exceptions resulting from special laws of the empire.—C. S. C. c. 8, s. 1 --; Poth. Pers. 573; 1 Dur. n. 120; Lah. a. 5; 1 Bla. 374, *n.* 16 - 18, 366, *n.* 1; 2 K. 38; 2 Steph. 429, 515; Chalm. Op. 332; 1 Ha. P. C. 68; 1 Com. 541; Chit. Pr. 13; Man. 23; C. N. 10. [I. 253.]

21. An alien becomes a British subject by operation of law, by conforming to the conditions the law prescribes.—1 Bla. 374 *n.* 16 - 18; 2 Steph. 427 - 433; Ha. l. c.; Fost. 184; C. N. 9; Donegani vs. Donegani, St. Rep. 605. [I. 253.]

22. These conditions, as prescribed by the laws of this province, are:

1. Residence during three years at least in some part of the province of Canada, with the intention of settling therein;

2. Taking the oaths of residence and allegiance required by law; or in the case of a

woman the oath of residence alone;

3. Procuring from the proper court, with the necessary formalities, the certificate of naturalization required by law.—C. S. C. c. 8, s. 1, 2, 3, 4; C. N. 9. [I, 253.]

23. An alien woman is naturalized by the mere fact of the marriage she contracts with a British subject.—C. S. C. c. 8, s. 7. [I. 253.]

24. Naturalization confers in Lower Canada, on him by whom it is obtained, all the rights and privileges he would have if born a British subject. Ib. s. 1; C. N. 13. [I. 253.]

25. Aliens have a right to acquire and transmit by gratuitous or onerous title, as well as by succession or by will, all moveable and immoveable property in Lower Canada, in the same manner as British-born or naturalized subjects.—Ib. s. 9; Poth. Pers. 578; C. N. 11. [I. 253.]

26. Aliens may also serve as jurors, in all cases where, according to law, a jury must be composed one half of foreigners.—C. S. C. c. 8, s. 23; C. S. L. C. c. 84, s. 41, § 3, s. 4. [I. 253.]

27. Aliens, although not resident in Lower Canada, may be sued in its courts for the fulfilment of obligations contracted by them even in foreign countries.—12 V. c. 38, s. 14, 49, 94; C. S. L. C. c. 83, s. 61; 2 P. Fr. 140; 1 Pi. 85; Rav. 6; Ord. 1667, t. 2, a. 7; C. N. 14. [I. 253.]

28. Any inhabitant of Lower Canada may be sued in its courts for the fulfilment of obligations contracted by him in foreign countries, even in favor of a foreigner.—C. N. 15. [I. 255.]

29. Every person, not resident in Lower Canada, who brings or institutes any action, suit or proceeding in its courts, is bound to give to the opposite party, whether a subject of Her Majesty or not, security for the costs which may be incurred in consequence of such proceeding.—C. S. L. C. c. 83, s. 68; 2 P. Fr. 143; Poth. Pers. 577; C. N. 16. [I. 255.]

CHAPTER SECOND.

OF THE LOSS OF CIVIL RIGHTS.

30. Civil rights are lost:

1. In the cases which are provided for by the laws of the British Empire;

2. By civil death.

Rich. Mort civ. 52 --; Poth. Suc. 10, 11; 1 Fav. Conf. 61; 1 Toul. n. 180, 266 --; 14 & 15 Hen. VIII, c. 4; 1 Pet. 463 or 321; 2 Tom. Treason § 2; 1 Bl. 370, *n.* 3, 374, *n.* 21; Fost. 841; Bur. 707, 8; and authorities under the following article. [I. 255.]

SECTION I.

Of Civil Death.

31. Civil death results from condemnation to certain corporal punishments.--Rich. Mort civ. 15, 16; Poth. Mar. 264; Poth. Pers. 585; Poth. Intr. n. 28; 11 Guy. Mort civ. 634; 2 Bla. 121; 1 Bla. 132, 133, *n.* 16; C. N. 22. [I. 255.]

32. Condemnation to death

carries with it civil death.—Poth. Intr. n. 30; Rich. Mort civ. 26; Guy. l. c.; Rochon vs. Leduc, 1 L. C. R. 252; C. N. 23. [I. 255.]

33. Civil death also results from the condemnation to any other corporal punishment for life.—1 Bla. 134; Guy. l. c; Rich. 26; Poth. Intr. n. 30; Id. Pers. 595; Id. Suc. 5. [I. 257.]

34. The disabilities which result as regards persons professing the catholic religion, from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved, remain subject to the laws by which they were governed at that period.—Poth. 587-9; Id. Suc. 125; Id. Mar. n. 264; Id. Intr. n. 28; O. 1167, t. 20, a. 15, 16; 11 Guy. l. c.; Rich. 596, 607 --, 643, 647, 651, 660; 1 Bla. 132, 3, *n.* 16; 2 Id. 121. [I. 257.]

SECTION II.

Of the Effects of Civil Death.

35. Civil death carries with it the loss of all the property of the party attainted, which is confiscated to the crown.—C. P. a. 183; 2 Bla. 381; Poth. Intr. n. 31; 11 Guy. 637; 2 P. Fr. 174; Rich. 46, 337; C. N. 25. [I. 257.]

36. A person civilly dead:

1. Cannot take or transmit by succession.—ff. L. 18, De bon. poss; 2 P. Fr. 183; Poth. Pers. 587; 11 Guy. 637; Rich. 203, 208, 217 --; Poth. Suc. 9; C. N. 25. [I. 257.]

2. He can neither dispose of nor acquire property, whether *inter vivos* or by will, and whether by gratuitous or onerous title; he can neither contract, nor possess property, but he may receive maintenance.—Poth. Pers. 587; N. D. Aliments, n. 24; 1 Arg. 16; 11 Guy. 637; 1 Dom. Liv. Prél. 106; 1 Pi. 66; 1 Bour. 128; 1 Dup. 36 --; C. N. 25. [I. 257.]

3. He can neither be appointed tutor nor curator, nor take part in the proceedings relative to such appointment.—2 P. Fr. 185, 6; Poth. Pers. 611; 11 Guy. 637. [I. 257.]

4. He cannot be a witness to any solemn or authentic deed, nor can he be admitted to give evidence in a court of justice, or to serve as a juror.—ff. L. 18, § 1, Qui. test. fac.; L. 20; 2 P. Fr. 185, 6; ff. L. 3, De test. § 5; 11 Guy. 637, 8; Rich. 251, 254. [I. 259.]

5. He cannot be a party to a suit, either as plaintiff or defendant.—ff. L. 2, De cap. min.; 2 P. Fr. 189, 190; Jou. O. 1667, a. 8, t. 2, p. 28; Rod. on do. 31; 1 Pi. 66. [I. 259.]

6. He is incapable of contracting a marriage that will produce any civil effect.—Poth. Com. 20; Id. Mar. 433, 440, 486; Id. Suc. c. 1, s. 2, a. 2, § 4; 11 Guy. 638; O. 1639, a. 7; 2 P. Fr. 191 --. [I. 259.]

7. Marriage previously contracted by him is dissolved for the future, in so far as regards its civil effects only; the marriage tie subsists.—Poth. Suc.

20; Id. Mar. 467; 3 P. Fr. 446 --; Gou. a. 227, p. 94, 5. a. 25, p. 19, 20; 1 Mal. 41 --; 1 Dur. n. 225; 2 Dur. 520; 1 Toul. 285, 6. [I. 259.]

8. His consort and his heirs may respectively exercise the rights and actions to which natural death would give rise; saving rights of survivorship, to which civil death only gives rise when that effect results from the terms of the marriage contract.—*ff.* L. 121, § 2 De v. sig.; 2 P. Fr. 198; 1 Domol. n. 210; Rich. 500; Lac. 459; 1 Toul. n. 286. [I. 259.]

37. Civil death is incurred from the time of the sentence.—Poth. Suc. c. 1, s. 1, p. 5, 6; c. 3, p. 125, 6; Id. Pers. t. 3, p. 596; 20 Merl. Mort civ. § 1, p. 432; Rich. 143-4-6-7; 5 Merl. Condamné, n. 1; ff. L. 15, § 1, De int. et rel; L. 10, § 1, L. 29, De pœn.; Gou. 21, on a. 26; C. N. 26. [I. 259.]

38. Pardon, liberation, and the remission of the penalty or its commutation to another which does not carry with it civil death, restore the civil ability of the person condemned, but without any retroactive effect, unless such effect be specially granted by act of parliament.—C. S. C. c. 99, s. 113. [I. 259.]

TITLE SECOND.

OF ACTS OF CIVIL STATUS.

CHAPTER FIRST.

GENERAL PROVISIONS.

39. In acts of civil status nothing is to be inserted, either by note or recital, but what it is the duty of the parties to declare.—C. N. 35. [I. 261.]

40. In cases where the parties are not obliged to appear in person at the making of an act of civil status, they may be represented by an attorney, specially authorized to that effect.—C. N. 36. [I. 261.]

41. The public officer reads to the parties, or to their attorney, and to the witnesses, the act which he makes.—C. N. 37. [I. 261.]

42. Acts of civil status are inscribed in two registers of the same tenor, kept for each Roman Catholic parish church, each Protestant church or congregation, or other religious community, entitled by law to keep such registers, each of which is authentic, and has in law equal authority.—O. 1667, t. 20, a. 8; Del. 1736, a. 1; C. S. L. C. c. 20, s. 1, 16, 17; C. N. 40. [I. 261.]

43. The registers are furnished by the churches, congregations or religious communities, and must be in the

form prescribed by the Code of Civil Procedure.—C. S. L. C. c. 20, s. 1, § 2; C. N. 40. [I. 261.]

44. The registers are kept by the rector, curate or other priest or minister having charge of the churches, congregations, or religious communities, or by any other officer entitled so to do.—C. S. L. C. c. 20, s. 1, § 1; C. N. 40. [I. 261.]

45. The duplicate register so kept, before it is used, must, at the instance of the party keeping it, be presented to one of the judges of the Superior Court or to the prothonotary of the district, or to the clerk of the Circuit Court instead of the prothonotary in the case specified in the statute 25 Vict., chap. 16, to be by such judge, prothonotary or clerk numbered and initialed in the manner prescribed by the Code of Civil Procedure.—C. S. L. C. c. 20, s. 1, § 2; C. N. 41. [I. 261; III. 373.]

46. Acts of civil status, as soon as they are made, are inscribed in the two registers, in successive order and without blanks; erasures and marginal notes are acknowledged and initialed by all those who sign the body of the act. Everything must be written at length without abbreviation or figures.—C. S. L. C. c. 20, s. 1; C. N. 42. [I. 261.]

47. Within the first six weeks of each year, the person who kept the said registers, or who has charge thereof, deposits in the prothonotary's office of the Superior Court of his district, or in the office of the clerk of the Circuit Court in the cases provided for in the statute already mentioned in the present chapter, one of the said duplicates, the delivery of which is acknowledged by a receipt which the said prothonotary or clerk is bound to give free of charge.—C. P. 241; O. Bl. a. 181; O. 1539, a. 51-53; O. 1667, a. 8, t. 20; C. S. L. C. c. 20, s. 8; C. N. 43. [I. 261; III. 373.]

48. Within six months after such deposit, each prothonotary or clerk is bound to verify the condition of the registers deposited in his office, and to draw up a summary report of such verification.—O. 1667, t. 20, a. 11. [I. 263; III. 373.]

49. The other duplicate register remains in the custody and possession of the priest, minister or other officer who kept the same; to be by him preserved and transmitted to his successor in office.—O. 1667, t. 20, a. 8; Del. 1736, a. 19, 20; C. S. L. C. c. 20, s. 8; C. N. 43. [I. 263.]

50. The depositary of either of the registers is bound to give extracts thereof to any person who may require the same; and such extracts, being certified and signed by him, are authentic.—C. S. L. C. c. 20, s. 8, § 2; C. N. 44. [I. 263.]

51. On proof that, in any parish or religious community no registers have been kept, or that they are lost, the births, marriages and deaths may be proved either by family registers and papers, or other

writings, or by witnesses.—C. S. L. C. c. 20, s. 13; 2 P. Fr. 263; O. 1167, t. 20, a. 14; Del. 1736; C. N. 46. [I. 263.]

52. Every depositary of such registers is civilly responsible for any alteration made therein, saving his recourse, if any there be, against the party altering the same.—2 P. Fr. 278; D. on a. 51; C. N. 51. [I. 263.]

53. Every infraction of any article of this title by any of the officers therein named, which does not amount to a criminal offence, and which is not punishable as such, is punished by a penalty not exceeding eighty dollars, nor less than eight.—O. 1667, t. 20, a. 12, 13, 18; Del. 1736, a. 19, 33 39; 2 P. Fr. 278; 2 V. c. 4, s. 2; C. S. L. C. c. 20, s. 9; C. N. 50. [I. 263.]

CHAPTER SECOND.

OF ACTS OF BIRTH.

54. Acts of birth set forth the day of the birth of the child, that of its baptism, if performed, its sex, and the names given to it; the names, surnames, occupation and domicile of the father and mother, and also of the sponsors, if any there be.—C. S. L. C. c. 20, s. 5; O. 1667, t. 20, a. 9; Del. 1736, a. 4; C. N. 57. [I. 263.]

55. These acts are signed in both registers, by the officer officiating, by the father and mother if present, and by the sponsors if any there be; if any of them cannot sign, their declaration to that effect is noted.—C. S. L. C. c. 20, s. 5, § 2; O. 1667, t. 20, a. 10; C. N. 39. [I. 263.]

56. When the father and mother of any child presented to the public officer are either or both of them unknown, the fact is mentioned in the register.—C. S. L. C. c. 20, s. 5, § 3; C. N. 55, 56, 58. [I. 265.]

CHAPTER THIRD.

OF ACTS OF MARRIAGE.

57. Before solemnizing a marriage, the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of bans required by law has been duly made; unless he has published them himself, in which case such certificate is not necessary.—Poth. Mar. n. 66-84, 349; C. N. 63. [I. 265.]

58 This certificate, which is signed by the person who published the bans, mentions, as do also the bans themselves, the names, surnames, qualities or occupations and domiciles of the parties to be married, and whether they are of age or minors; the names, surnames, occupations and domiciles of their fathers and mothers, or the name of the former husband or wife. And mention is made of this certificate in the act of marriage.—Poth. Mar. n. 66 --; O. Bl. a. 40; 2 P. Fr. 320, 1; C. N. 63, 166. [I. 265.]

59. The marriage ceremony may, however, be performed without this certificate, if the parties have obtained and produce a dispensation or license, from a competent authority,

authorizing the omission of the publication of bans.—Poth. Mar. l. c. & n. 70; O. Bl. a. 40; C. S. L. C. c. 20, s. 6; C. N. 63. [I. 265.]

60. If the marriage be not solemnized within one year from the last of the publications required, they are no longer sufficient, and must be renewed. —3 N. D. Bans de Mar. 111; 2 P. Fr. 328; 2 Merl. Bans, 442; 2 Guy. Bans, 175; 1 Toul. n. 567; O. 1067; C. N. 65; Del. 1736. [I. 265.]

61. In the case of an opposition, the disallowance thereof must be obtained and be notified to the officer charged with the solemnization of the marriage.—Poth. Mar. n. 82; Guy. Oppos. à un mar. al. 1, 2; Fer. D. i. v.; C. N. 68. [I. 265.]

62. If, however, the opposition be founded on a simple promise of marriage, it is of no effect, and the marriage is proceeded with as if no such opposition had been made.—C. S. L. C. c. 34, s. 4. [I. 265.]

63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties. For the purposes of marriage, domicile is established by a residence of six months in the same place.—Fen. Poth. 18; Poth. Mar. 356; C. N. 74. [I. 265.]

64. The act is signed by the officer who solemnizes the marriage, by the parties, and by at least two witnesses, related or not, who have been present at the ceremony; and if any of them cannot sign, their declaration to that effect is noted.—C. S. L. C. c. 20, s. 6. [I. 265.]

65. In this act are set forth:

1. The day on which the marriage was solemnized;

2. The names, surnames, quality or occupation and domicile of the parties married, the names of the father and mother of each, or the name of the former husband or wife;

3. Whether the parties are of age, or minors;

4. Whether they were married after publication of bans, or with a dispensation or license;

5. Whether it was with the consent of their father, mother, tutor or curator, or with the advice of a family council, when such consent or advice is required;

6. The names of the witnesses, and whether they are related or allied to the parties, and if so, on which side, and in what degree;

7. That there has been no opposition, or that any opposition made has been disallowed;

Poth. Mar. 375; C. S. L. C. c. 20, s. 6, § 1, 2; C. N. 76. [I. 267.]

CHAPTER FOURTH.

OF ACTS OF BURIAL.

66. No burial can take place before the expiration of twenty-four hours after the decease; and whoever knowingly takes part in any burial before the expiration of such time, except in cases provided for by police

regulations, is subject to a penalty of twenty dollars.—C. S. L. C. c. 21, s. 1; C. N. 77. [I. 267.]

67. The act of burial mentions the day of the burial, and that of the death, if known; the names, surnames, and quality or occupation of the deceased; and it is signed by the person performing the burial service, and by two of the nearest relations or friends there present; if they cannot sign, mention is made thereof.—C. S. L. C. c. 20, s. 7; O. 1667, t. 20, a. 10; Del. 1736, a. 10; 2 P. Fr. 382; C. N. 79. [I. 267.]

68. The provisions of the two preceding articles apply to religious communities and hospitals where burials are permitted.—O. 1667, t. 20, a. 13; C. S. L. C. c. 20, s. 11; C. N. 80; [I. 267.]

69. When there is any sign or indication of death having been caused by violence, or when there are other circumstances which give reason to suspect it, or when the death happens in any prison, asylum, or place of forcible confinement other than lunatic asylums, the burial cannot be proceeded with until it is authorized by the coroner or other officer whose duty it is to inspect the body in such cases.—Del. 20 Sep. 1712; 20 Isam. 574; Del. 1736, a. 12; 1 Jou. 306; 1 Rus. Cr. 468; 1 Bla. 265, *n.* 27; 4 & 5 V. c. 24, s. ; C. N. 81. [I. 267; III. 373.]

CHAPTER FIFTH.

OF ACTS OF RELIGIOUS PROFESSION.

70. In every religious community in which profession may be made by solemn and perpetual vows, two registers of the same tenor are kept, in which are inscribed the acts establishing the taking of such vows.—O. 1667, t. 20. a. 15; Del. 1736, a. 25; Serp. 232-7-8; Sal. 234-5-7, 236, *n.* (a) [I. 269.]

71. [These registers are numbered and initialed like the other registers of civil status, and the acts are inscribed therein in the manner prescribed in article 46.]—O. 1667, a. 16; Del. 1736, a. 25; Serp. 332; Sal. 236. [I. 269.]

72. The acts set forth the names and surnames, and the age of the person making profession, the place of her birth and the names and surnames of her father and mother. They are signed by the party, by the superior of the community, by the bishop or other ecclesiastic who performs the ceremony, and by two of the nearest relations, or by two friends who were present.—Del. 1736, a. 27, 28. [I. 269.]

73. The registers are used during five years, after which one of the duplicates is deposited in the manner declared in article 47, and the other remains with the community to form part of its records.—Del. 1736, a. 8. [I. 269.]

74. Extracts of such registers, signed and certified by the superior of the community,

or the depositary of one of the duplicates, are authentic, and are delivered by one or other of them at the option and on the demand of those requiring them.—Del. 1736, a. 29. [I. 269.]

CHAPTER SIXTH.

OF THE RECTIFICATION OF ACTS AND REGISTERS OF CIVIL STATUS.

75. If any error have been committed in the entry made in the register of an act of civil status, the court of original jurisdiction in the office of which such register is or is to be deposited may, at the instance of any interested party, order such error to be rectified in presence of the other parties interested.—O. 1667; Del. 1736, a. 30; 1 Ency. 205, 6; Merl. Acte de l'et. civ.; 1 Rog. a. 99, p. 85; F. C. P. 855; 35 Geo. III. c. 4, s. 13; C. N. 99. [I. 269.]

76. The depositaries of the registers, on receipt of a copy of any judgment of rectification, are bound to inscribe the same on the margin of the act so rectified, and if there be no margin, then on a sheet of paper which remains annexed thereto.—Del. 1736, a. 30; C. N. 101. [I.269.]

77. [If any act which ought to have been inserted in the register be entirely omitted, the same court may, at the instance of one of the parties interested, the others being notified, order that such omission be supplied, and the judgment so ordering is inscribed on the margin of the said register, at the place where the act so omitted ought to have been entered, and if there be no margin, then on a sheet of paper which remains annexed thereto.]—35 Geo. 3, c. 4, s. 11, 13; 1 Mal. 375; O. 1667, t. 20, a. 14; Serp. 338-341; Del. 1736, a. 30; Jou. 321; Rod. 356 --; 1 Bor. 160; 27 Merl. 263; 11 Id. 148; F. C. P. a. 855; 1 Toul. n. 342, 350; C. N. 99. [I. 271.]

78. The judgment of rectification cannot, at any time, be set up against those who did not seek it, or who were not duly notified.—2 P. Fr. on a. 1000, p. 406; Rog. on do. 85; C. N. 100. [I. 271.]

TITLE THIRD.

OF DOMICILE.

79. The domicile of a person, for all civil purposes, is at the place where he has his principal establishment.—Cod. L. 7, De incol.; Poth. Intr. 8, 20; Id. Mar. 355; Merl. Domicile, § 2, n. 3, 4; 2 P. Fr. 409, 413; 1 Toul. n. 364-6; C. N. 102. [I. 271.]

80. Change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his princi-

pal establishment.—Poth. Intr. 14; ff. L. 4 & 20, ad. muni. et de incol.; 1 Toul. 323; C. N. 103. [I. 271.]

81. The proof of such intention results from the declarations of the person and from the circumstances of the case. C. N. 104. [I. 271.]

82. A person appointed to fill a temporary or revocable public office, retains his former domicile, unless he manifests a contrary intention.—Poth. Intr. 9, 15; Cod. L. 2, De incol; C. N. 106; C. L. 46. [I. 271.]

83. A married woman, not separated from bed and board, has no other domicile than that of her husband.—The domicile of an unemancipated minor is with his father and mother, or with his tutor.—The domicile of a person of the age of majority interdicted for insanity is wth his curator.—Poth. Intr. 10-12, 18, 19; Id. Mar. 357; 2 P. Fr. 423; C. N. 108; C. L. 48. [I. 273.]

84. The domicile of persons of the age of majority, who serve or work continuously for others, is at the residence of those whom they serve or for whom they work, if they reside in the same house.—ff. l. c. L. 6, § 3; L. 22; Merl. Domicile, § 4. n. 1; 2 P. Fr. 227; 1 Bour. 90; C. N. 109. [I. 273.]

85. When the parties to a deed have for the purpose of such deed, made election of domicile in any other place than their real domicile, all notifications, demands and suits relating thereto may be made at the elected domicile, and before the judge of such domicile.—Loy. Seign. c. 14, n. 15; Bac. c. 8, n. 16; Ravi. Q. 297, n. 21; 8 Merl. Domicile élu, § 2; D. 26, 27; 2 P. Fr. 431 · C. N. 111. [I. 273.]

TITLE FOURTH.

OF ABSENTEES.

GENERAL PROVISION.

86. An absentee, within the meaning of this title, is one who having had a domicile in Lower Canada, has disappeared, without any one having received intelligence of his existence.—1 Mal. 127, 116; Demo. Absence, 5; 2 Lo. E. C. 281; 1 Toul. n. 381; Ency. 42; C. N. 115. [I. 273.]

CHAPTER FIRST.

OF CURATORSHIP TO ABSENTEES.

87. If it be necessary to provide for the administration of the property of an absentee who has no attorney, or whose attorney is unknown or refuses to act, a curator may be appointed for that purpose.—Bret. Q. Absent, c. 3, p. 7; N.

D. Absence, 56; C. S. L. C. c. 86, s. 2--; Bi. Absence, p. 21; Rog. on a. 112; C. N. 112. [I. 273.]

88. The necessity for such appointment is determined, at the instance of those interested, on the advice of a family council called and composed in the manner provided in the title *Of Minority, Tutorship and Emancipation*, and homologated by the court, or by one of its judges, or by the prothonotary.—C. S. L. C. c, 86 s. 2--, c. 78, s. 23; C. N. 116. [I. 273.]

89. Curators to the property of absentees make oath faithfully to fulfil the duties of their office and to account.—2 Pi. 510, 511; C. L. 52. [I. 275.]

90. The curator is bound to cause to be made, in notarial form, a faithful inventory and valuation of all the property committed to his charge, and for his administration he is liable to the same obligations as those to which tutors are subject.—Pi. l. c.; C. L. 52. [I. 275.]

91. The powers of such curator extend to acts of administration only; he can neither alienate, pledge nor hypothecate the property of the absentee.—Ency. Absent; Arr. Lam. t. 6, Des Abs. p. 37--; Bav. & L. 137--. [I. 275.]

92. The curatorship to the absentee is brought to an end:

1. By his return;

2. By his sending a power of attorney to the curator or to any other person;

3. By his heirs being authorized to take provisional possession of his property, in the cases provided by law.—Ency. Absent; Arr. Lam. t. 6, p. 37--; 1 Bav. & L. 137. [I. 275.]

CHAPTER SECOND.

OF THE PROVISIONAL POSSESSION OF THE HEIRS OF ABSENTEES.

93. Whenever a person has ceased to appear at his domicile or place of residence, and has not been heard of for a period of [five] years, his presumptive heirs at the time of his departure or of the latest intelligence received, may obtain from the court authority to take provisional possession of his property, on giving security for their due administration of it.—Poth. C. O. t. 17, n. 37; Id. Suc. c. 3, s. 1, § 1; Bret. Q. D. c. 3, p. 7, 8; 3 P. Fr. 3; C. N. 115, 120; C.L. 58. [I. 275.]

94. Provisional possession may be authorized before the expiration of such delay, if it be established to the satisfaction of the court that there are strong presumptions that the absentee is dead.—Bret. Absents, c. 3, p. 7; 1 Ency. 44; Leb. Suc. l. 1, c. 1. s. 1, n. 5; J. A. Arr. 2 jan. 1634, 23 mar. 1688; 2 Bret. H. l. 4, Q. 46; 3 P. Fr. 14; 10 N. D. Absent, 62; C. N. 117; C. L. 61. [I. 277.]

95. In pronouncing on such demand, the court takes into account the reasons of the absence and the causes which may have prevented the reception of intelligence concerning the absentee.—Poth. C. O. t.

17, n. 37; Leb. Suc. l. c.; C. N. 117; C. L. 62. [I. 277.]

96. Provisional possession is a trust which gives to those who obtain it, the administration of the property of the absentee and makes them liable to account to him or to his heirs and legal representatives.—C. N. 125. [I. 277.]

97. Those who have obtained provisional possession are bound to make an inventory, before a notary, of the moveable property and title deeds of the absentee, [and to cause the immoveable property to be visited by skilled persons for the purpose of ascertaining its condition. Their report is homologated by the court, and the costs are paid out of the absentee's property.] — The court which granted the possession may, if there be ground for it, order the sale of the moveables or of any part of them; in which case, the price of such sale is invested, as are also all rents, issues and profits accrued.—Bi. Absence, p. 129; C. N. 126. [I. 277; III. 373.]

98. If the absence have continued during thirty years from the day of the disappearance, or from the latest intelligence received, or if a hundred years have elapsed since his birth, the absentee is reputed to be dead from the time of his disappearance or from the latest intelligence received; in consequence, if provisional possession have been granted, the sureties are discharged, the partition of the property may be demanded by the heirs or others having a right to it, and the provisional possession becomes absolute.—Bi. Abs. 245, 248; Arr. Lam. Absents, c. 6, a. 4, p. 38; 2 Lam. Mém. t. 6, Abs. p. 43; 3 P. Fr. 46, 7; Bret. Absents, 13; Lah. 41, on a. 129; 1 N. D. Absence, 55; 10 Id. 70; J. A. Arr. 2 jan. 1634; 1 Guy. Absent, 68; 2 Demol. p. 71; C. N. 129. [I. 277.]

99. Notwithstanding the presumptions mentioned in the preceding article, the succession of the absentee devolves from the day on which he is proved to have died, to the heirs entitled at such time to his estate; and those who have been in the enjoyment of the absentee's property are bound to restore it.—D. 31; C. N. 130; C. L. 72. [I. 279.]

100. If the absentee reappear, or if his existence be proved during the provisional possession, the judgment granting it, ceases to have effect.—C. N. 131; C. L. 73. [I. 279.]

101. If the absentee reappear, or if his existence be proved, even after the expiration of the hundred years of life or of the thirty years of absence, as mentioned in article 98, he recovers his property in the condition in which it then is, and the price of what has been sold, or the property arising from the investment of such price.—3 P. Fr. 45, 6; Bi. Abs. 245; 2 Demol. 283-9; Merl. Q. Héritier, 325, 328, 330-2; 9 N. D. Héritier, § 2, n. 16, p. 600; C. N. 132. [I. 279.]

102. The children and direct descendants of the absentee may likewise, within the thirty

years from the time at which the said possession becomes absolute, claim the restitution of his property, as mentioned in the preceding article.—C. N. 133; P. Fr. l. c.; C. L. 75. [I. 279.]

103. After the judgment authorizing provisional possession, persons having claims against the absentee can only enforce them against those who have been authorized to take possession.—Arr. Lam. t. 6, a. 6, p. 38; Bret. Absents, p. 15; Lam. Mém. 44; C. L. 76; C. N. 134. [I. 279.]

CHAPTER THIRD.

OF THE EFFECT OF ABSENCE IN RELATION TO CONTINGENT RIGHTS WHICH MAY ACCRUE TO THE ABSENTEE.

104. Whoever claims a right accruing to an absentee must prove that such absentee was living at the time the right accrued; in default of such proof his demand is not admitted.—Poth. Suc. 8, 9, c. 1, s. 2, a. 1; 1 N. D. Absence, § 2, p. 57; Bi. Abs. 157 --; Poth. C. O. t. 17, n. 6, 7; 2 Demol. 4, 5; 1 Guy. Absent, 66; Lah. 43, on a. 135; 10 N. D. Absence, 70; Bret. Q. Absents, 9, 10; Arr. 2 jan. 1634; C. N. 135. [I. 279.]

105. If an absentee be called to a succession, it devolves exclusively to those who would have shared with him, or to those who would have succeeded in his stead.—10 N. D. Absent, 70; 1 Toul, n. 473-475, 400, 481; 4 Id. 306, 316; 7 Id. 34; 10 Id. 7; 2 P. Poul. 46, n. 7, 8; 3 P. Fr. 59; Bi. 287-9; C. N. 136. [I. 281.]

106. The provisions of the two preceding articles do not affect actions for the recovery of inheritances and of other rights, which actions belong to the absentee, his heirs and legal representatives, and are only extinguished by the lapse of time required for prescription.—3 P. Fr. 60; C. N. 137. [I. 281.]

107. So long as the absentee does not reappear, or actions are not brought on his behalf, those to whom the succession has devolved make the profits received by them in good faith their own.—1 Merl. Absent, 94; Poth. Prop. n. 395-6; 1 Delv. n. 4, p. 50; C. N. 138. [I. 281.]

CHAPTER FOURTH.

OF THE EFFECTS OF ABSENCE IN RELATION TO MARRIAGE.

108. The presumptions of death arising from absence, whatever be its duration, do not apply in the case of marriage; the husband or wife of the absentee cannot marry again without producing positive proof of the death of such absentee.—Bi. Abs. 30, 216-232; 2 Demol. n. 7, 260; Demo. Abs. n. 511; 1 Zach. 315, 202; Dag. 28 Plaid; R. de Vil. Abs. n. 343-4; 1 Merl. Absence, 96; 3 P. Fr. 61; 2 Lam. Mém. 42; 1 Id. Arr. 38; 10 N. D. 71; Bret. Q. Absent, 3, c. 1; Poth. Mar. n. 106; Ency. Absent, 45; 1 Guy. Absent, 67. [I. 281.]

109. If there be community of property between the

consorts, such community is provisionally dissolved, from the day of the demand to that effect by the presumptive heirs, after the time required for obtaining authority to take possession of the absentee's property, or from the date of the action that the consort who is present brings against them, for the same purpose; and in these cases, the liquidation and partition of the property of the community may be proceeded with on the demand of such consort, or of the persons authorized to take provisional possession, or of any other parties interested.—Poth. Com. n. 505; 1 Guy. Absent, 69; 1 Char. D. 3 Puis. 220; C. N. 124. [I. 283.]

110. In the cases provided for in the preceding article, the covenants and rights of the consorts, dependent on the dissolution of the community, become effective and absolute. —1 Lam. Arr. 37; 2 Id. Mém. 42; C. N. 124. [I. 283.]

111. If the husband be the absentee, the wife may obtain possession of all the matrimonial profits and advantages resulting from the law or from her marriage contract; but on condition of giving good and sufficient security to account for and restore all that she shall have so received, should the absentee return.—2 Lam. Mém. 42; 1 Ency. Absents, 49; Bret. Q. 4; C. N. 124. [I. 283.]

112. If the absent consort have no relations entitled to his succession, the consort who is present may obtain provisional possession of the property.—Poth. C. O. t. 17, n. 35; ff. L. un. undè v. et ux.; 1 Toul. 411; 1 Delv. 48; 3 P. Fr. 64; Lah. 45; C. N. 140. [I. 283.]

CHAPTER FIFTH.

OF THE CARE OF MINOR CHILDREN OF A FATHER WHO HAS DISAPPEARED.

113. If a father have disappeared, leaving minor children issue of his marriage, the mother has the care of such children and exercises all the rights of her husband as to their person and as to the administration of their property, until a tutor is appointed.—Cod. arg. ex L. I, ubi pup. edu.; 3 P. Fr. on a. 141, p. 65; 1 Toul. 389; 1 Dur. 438; C. N. 141. [I. 283.]

114. After the disappearance of the father, if the mother be dead or unable to administer the property, a provisional or a permanent tutor may be appointed to the minor children. —Bret. Absents, c. 2, p. 6; 1 Guy. Absent, 68; 3 P. Fr. 65; C. N. 142. [I. 283.]

TITLE FIFTH.

OF MARRIAGE.

CHAPTER FIRST.

OF THE QUALITIES AND CONDITIONS NECESSARY FOR CONTRACTING MARRIAGE.

115. A man cannot contract marriage before the full age of fourteen years, nor a woman before the full age of twelve years.—Poth. Mar. n. 94; Inst. t. de nupt.; 3 P. Fr. 139; D. on a. 144; C. N. 144. [I. 283.]

116. There is no marriage when there is no consent.—Poth. Mar. n. 92, 93, 227, 307; 3 P. Fr. 141 --; C. N. 146. [I. 285.]

117. Impotency, natural or accidental, existing at the time of the marriage, renders it null; but only if such impotency be apparent and manifest.—This nullity cannot be invoked by any one but the party who has contracted with the impotent person, nor at any time after three years from the marriage.—Poth. Mar. 96, 445, 458; Merl. Congrès, n. 3, Impuissance, n. 2; 3 Demol. n. 12; 5 Lo. L. C. 85; 6 Id. 35; 2 Toul. n. 805; 3 P. Fr. 275; 2 Dur. n. 67, 71; A. D. Impuissance, n. 32, 36; C. N. 180, 313. [I. 285.]

118. A second marriage cannot be contracted before the dissolution of the first.—Poth. Mar. n. 103, 105; 3 P. Fr. 154; Lah. 47; C. N. 147. [I. 285.]

119. Children who have not reached the age of twenty-one years must obtain the consent of their father and mother before contracting marriage; in case of disagreement, the consent of the father suffices. —Poth. Mar. n. 324-328; Poth. Pers. pt. 1, t. 6, s. 2; 3 P. Fr. 165; Del. 1639: Dag. 30e Plaid; C. N. 148. [I. 285.]

120. If one of them be dead or unable to express his will, the consent of the other suffices. —Cod. L. 25, de nupt.; 3 P. Fr. 164, 178; C. N. 149. [I. 285.]

121. A natural child who has not reached the age of twenty-one years must be authorized, before contracting marriage, by a tutor *ad hoc* duly appointed for the purpose. —Cod. l. c.; Poth. Mar. 342; C. N. 148, 149. [I. 285.]

122. If there be neither father nor mother, or if both be unable to express their will, minor children, before contracting marriage, must obtain the consent of their tutor, or, in cases of emancipation, their curator, who is bound, before giving such consent, to take the advice of a family council, duly called to deliberate on the subject.—ff. L. 20, de ritu nupt.; Cod. L. 8, de nupt.; 3 P. Fr. 189; Poth. Mar. n. 321, 333, 334, 336; Lah. 52; O. Bl. a.

43; Del. 1721, a. 5; Del. 1743, a. 12; Ed. et O. R.; C. N. 160. [I. 285.]

123. Respectful requisitions to the father and mother are no longer necessary. [I. 285.]

124. In the direct line, marriage is prohibited between ascendants and descendants and between persons connected by alliance, whether they are legitimate or natural.—Inst. l. 1, t. 10; ff. L. 53, 54, de ritu nupt; Poth. Mar. n. 132, 148 i. f., 153; 3 P. Fr. 197, 198, 295 --; 1 Merl. Affinité, § 1; C. N. 161. [I. 285.]

125. In the collateral line, marriage is prohibited between brother and sister, legitimate or natural, and between those connected in the same degree by alliance, whether they are legitimate or natural.—ff. L. 14, L. 39, de ritu nupt.; Cod. L. 5, de incest. nupt.; Poth. Mar. n. 133, 154, 158, 160; 1 Toul. n. 537; C. N. 162. [I. 285.]

126. Marriage is also prohibited between uncle and niece, aunt and nephew.—ff. l. c.; Inst. De nupt. L. 39; 10 Merl. Empêchement, § 4; Poth. Mar. n. 133, 146, 148, 154, 161; C. N. 163. [I. 285.]

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.—The right, likewise, of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it.—2 Steph. 240, 284. [I. 287; III. 373.]

CHAPTER SECOND.

OF THE FORMALITIES RELATING TO THE SOLEMNIZATION OF MARRIAGE.

128. Marriage must be solemnized openly, by a competent officer recognized by law.—C. N. 165. [I. 287.]

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.—But none of the officers thus authorized, can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.—Poth. Mar. 346, 349, 354-360; 1 Rus. Cr. 192 --; 35 Geo. III. c. 4, s. 1; C. S. L. C. c. 20, s. 16, 17; C. N. 75. [I. 287.]

130. The publications of bans, required by articles 57 and 58, are made by the priest, minister or other officer, in the church to which the parties belong, at morning service, or if there be no morning service, at evening service, on three Sundays or holidays with reasonable intervals. If the parties belong to different churches, these publications take place in each of such churches.—Poth. Mar. 72-5, 356; O. Bl. a. 40; Merl. Mar. § 4; Whar. L. L. Bans; 1 Rus. Cr. 189 --; 2 Id. 190; 4 Geo. IV, c. 76, s. 6, 7; 2 P. Fr. 321 --; 4 Geo. IV, c. 76, s. 2;

Lew. Mar. 82; C. N. 63, 166. [I.287.]

131. If the actual domicile of the parties to be married has not been established by a residence of six months at least, the publications must also be made at the place of their last domicile in Lower Canada.—Guy. Bans de Mar. 175; C. N. 167. [I. 287.]

132. [If their last domicile be out of Lower Canada, and the publications have not been made there, the officer who, in that case, solemnizes the marriage, is bound to ascertain that there is no legal impediment between the parties.] [I. 287.]

133. If the parties or either of them be, in so far as regards marriage, under the authority of others, the bans must be also published at the place of domicile of those under whose power such parties are.—Poth. 72, 357; C. N. 168. [I. 287.]

134. The authorities who have hitherto held the right to grant licenses or dispensations for marriage, may exempt from such publications.—Poth. 77, 78; O. Bl. a. 40; 2 P. Fr. 324; 4 Geo. IV, c. 76; 35 Geo. III, c. 4, s. 4; C. N. 169. [I. 289.]

135. A marriage solemnized out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnized according to the formalities of the place where it is performed, provided, that the parties did not go there with the intention of evading the law.—2 Merl. Bans. 436, 7; 1 Toul. n. 577; 1 Vaz. 314; R. de Vil. Mar. n. 22; 3 Fav. Rep. 30; Poth. Mar. 327, 363; 1 Bouh. 390; C. N. 170. [I. 289.]

CHAPTER THIRD.

OF OPPOSITIONS TO MARRIAGE.

136. The solemnizing of a marriage may be opposed by any person already married to one of the parties intending to contract.—Poth. n. 81; 3 P. Fr. 241; C. N. 172. [I. 289.]

137. The marriage of a minor may be opposed by his father or, in default of the latter, by his mother.—Poth. Mar. 81; Merl. Opp. à Mar. on a. 173; 1 Toul. 489; C. N. 173. [I. 289.]

138. In default of both father and mother, the tutor or, in cases of emancipation, the curator may also oppose the marriage of such minor; but the court to which such opposition is submitted, cannot decide on its merits without the advice of a family council, which it must order to be called.—Poth. Mar. 81; Merl. Opp. à Mar. on a. 172; 1 Toul. 425, 490; 3 P. Fr. 248; 2 Fav. Mar. s. 2, § 1, n. 3, p. 59; 1 Delv. 62; C. N. 175. [I. 289.]

139. If there be neither father nor mother, tutor nor curator, or if the tutor or curator have consented to the marriage without taking the advice of a family council, the grandfathers and grandmothers, the uncles and aunts, and the cousins-german, who are of full age, may oppose the marriage of their minor relative; but only in the two following cases:

1. When a family council,

which, according to article 122, should have been consulted, has not been so;

2. When the party to be married is insane.—Authorities under preceding article; 2 Toul. 446, 7; C. N. 174. [I. 289.]

140. When opposition is made under the circumstances and by any of the persons mentioned in the preceding article, if the minor have neither tutor nor curator, the opposant is bound to cause one to be appointed; if the minor have already a tutor or curator, who has consented to the marriage without consulting a family council, the opposant must cause a tutor *ad hoc* to be appointed; in order that such tutor, curator, or tutor *ad hoc* may represent the interests of the minor in such opposition.—[I. 289.]

141. [If a person about to be married, being of the age of majority, be insane, and not interdicted, the following persons may oppose the marriage, in the following order:

1. The father, and in his default, the mother;

2. In default of both father and mother, the grandfathers and grandmothers;

3. In default of the latter, the brothers or sisters, uncles or aunts, or cousins-german, of the age of majority;

4. In default of all the above, those related or allied to such person who are qualified to take part in the meeting of a family council, which should be consulted as to the interdiction.] 3 P. Fr. 246, 7; C. N. 174. [I. 291.]

142. When the opposition is founded on the insanity of the person about to be married, the opposant is bound to apply for the interdiction and to have it pronounced without delay.—3 P. Fr. 247; Poth. Mar. n. 81; Merl. Opp. au Mar. 98 --, & n. 4 on a. 174; C. N. 174. [I. 291.]

143. [Whatever may be the quality of the opposant, it is his duty to adopt and follow up the formalities and proceedings necessary to have his opposition brought before the court and decided within the legal delays, a demand for its dismissal not being required; in default of his so doing, the opposition is regarded as never having been made, and the marriage ceremony is proceeded with, notwithstanding.—3 P. Fr. 254. [I. 291.]

144. The Code of Civil Procedure contains the rules as to the form, contents and notifications of oppositions to marriage, as well as those relative to the peremption mentioned in the preceding article, and to the other proceedings required.—C. N. 176; [I. 291.]

145. The oppositions are brought before the court of original jurisdiction of the domicile of the party whose marriage is opposed, or of the place where the marriage is to be solemnized, or before a judge of such court.—3 P. Fr. 253; C. N. 177. [I. 291; III. 373.]

146. Proceedings upon appeals from such judgments are summary and take precedence.

—3. P. Fr. 253, 4; C. N. 178. [I. 291.]

147. If the opposition be rejected, the opposants, other than the father and mother, may be condemned to pay costs, and are liable for damages according to circumstances.—3 P. Fr. 255, 6; C. N. 179. [I. 291.]

CHAPTER FOURTH.

OF ACTIONS FOR ANNULLING MARRIAGE.

148. A marriage contracted without the free consent of both parties, or of one of them, can only be attacked by such parties themselves, or by the one whose consent was not free.—When there is error as to the person, the marriage can only be attacked by the party led into error.—Poth. Mar. 444, 308; 3 P. Fr. 146, 7; Merl. Mar. s. 1, § 2; s. 6, § 2; C. N. 180. [I. 291.]

149. [In the cases of the preceding article, the party who has continued cohabitation during six months after having acquired full liberty or become aware of the error, cannot seek the nullity of the marriage.]—C. N. 181. [I. 291.]

150. A marriage contracted without the consent of the father or mother, tutor or curator, or without the advice of a family council, in cases where such consent or advice was necessary, can only be attacked by those whose consent or advice was required.—Poth. l. c. & 447; C. N. 182. [I. 291.]

151. [In the cases of articles 148 and 150, an action for annulling marriage cannot be brought by the husband or wife, tutor or curator, or by the relations whose consent is required, if the marriage have been either expressly or tacitly approved by those whose consent was necessary; nor if six months have been allowed to elapse without complaint on their part since they became aware that the marriage had taken place].—Poth. Mar. n. 446; Id. Pers. pt. 1 t. 6. s. 2; 3 P. Fr. 267, 268; C. N. 183. [I. 293.]

152. Any marriage contracted in contravention of articles 124, 125 and 126, may be contested either by the parties themselves, or by any of those having an interest therein.—Poth. 444, 449, 451; 3 P. Fr. 271-275; C. N. 184. [I. 293.]

153. But a marriage contracted before the parties or either of them have attained the age required, can no longer be contested:

1. When six months have elapsed since the party or parties have attained the proper age;

2. When the wife, under that age, has conceived before the termination of the six months.—Poth. 94, 95; P. Fr. 275, 281; C. N. 185. [I. 293.]

154. The father, mother, tutor or curator, or the relations who have consented to the marriage, in the cases mentioned in the preceding article, are not allowed to seek the nullity of such marriage.—Poth. 446; 3 P. Fr. 282-3; C. N. 186. [I. 293.]

155. In the cases referred to in article 152, where the action for annulling the marriage belongs to all those interested, the interest must be existing and actual, to permit the exercise of the right of action by the grandparents, collateral relatives, children born of another marriage, and third persons.—Poth. Mar. n. 1; 10 Merl. Q. § 5, p. 19; Merl. Mar. 483; Lah. on a. 187; Leb. Suc. l. 3, c. 6; 3 P. Fr. 283 --; C. N. 187. [I. 293.]

156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances.—Poth. Mar. 361, 362, 451; C. N. 191. [I. 293.]

157. [If the publications required were not made, or their omission supplied by means of a dispensation or license, or if the legal or usual intervals for the publications or the solemnization have not elapsed, the officer solemnizing the marriage under such circumstances, is liable to a penalty not exceeding five hundred dollars.]—C. N. 192. [I. 293.]

158. [The penalty imposed by the preceding article is in like manner incurred by any officer who, in the execution of the duty imposed upon him, or which he has undertaken, as to the solemnization of a marriage, contravenes the rules prescribed in that respect by the different articles of the present title.]—C. N. 193; Poth. Mar. 364. [I. 293.]

159. No one can claim the title of husband or wife and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the cases provided for by article 51.—Poth. 378; O. 1667, t. 20, a. 7; C. N. 194. [I. 295.]

160. Possession of the status does not dispense those who pretend to be husband and wife, from producing the certificate of their marriage.—Poth. 374-378; O. 1667, t. 20, a. 8; Del. 1736; 3 P. Fr. 319; C. N. 195. [I. 295.]

161. When the parties are in possession of the status, and the certificate of their marriage is produced, they cannot demand the nullity of such act.—3 P. Fr. 322; C. N. 196. [I. 295.]

162. Nevertheless, in the case of articles 159 and 160, if there be children issue of two persons who lived publicly as husband and wife, and who are both dead, the legitimacy of such children cannot be contested solely on the pretext that no certificate is produced, whenever such legitimacy is supported by possession of the status uncontradicted by the act of birth.—Cod. L. 9 de nupt. ff. L. 14, De probat.; 1 Coch. Pl. Bourjelas; 3. P. Fr. 325-337; Merl. Légitimité, s. 1 § 2, p. 28; 1 Toul. 320, 498; 2 Id. 151; 1 Delv. 173; C. N. 197. [I. 295.]

163. A marriage although

declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.—Poth. Mar. 104, 437, 438, 419, 441, Suc. c. 1, s. 2, a. 3, § 4, Com. Intr. n. 17; C. O. t. 17, n. 13; Merl. Légitimité, s. 1, § 1, n. 8; C. N. 201. [I. 295.]

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favor of such party alone and in favor of the children issue of the marriage.—Poth. Mar. 439, 440; Com. 20; Suc. c. 1, s. 2, a. 3, § 4; C. O. t. 17, n. 13; D. 45; C. N. 202. [I. 295.]

CHAPTER FIFTH.

OF THE OBLIGATIONS ARISING FROM MARRIAGE.

165. Husband and wife contract, by the mere fact of marriage, the obligation to maintain and bring up their children.—Poth. Mar. 384, 394; Merl. Aliments, § 1, a. 1, n. 3, 5, 6; ff. L. 4, 5, de agn. & alend. lib.; 2 Toul. 2,237; 1 Delv. 91; C. N. 203. [I. 295.]

166. Children are bound to maintain their father, mother and other ascendants, who are in want.—Poth. Ob. 123; Mar. 389, 390, 392, 393, 395; Pers. p. 1, t. 6, s. 2; Intr. n. 117; 1 Marc. n. 722; C. N. 205. [I. 295.]

167. Sons-in-law and daughters-in-law are also obliged, in like circumstances, to maintain their father-in-law and mother-in-law, but the obligation ceases:

1. When the mother-in-law contracts a second marriage;

2. When the consort, through whom the affinity existed, and all the children issue of the marriage, are dead.—3 P. Fr. 360; C. N. 206. [I. 295.]

168. The obligations which result from these provisions are reciprocal.—Poth. Mar. 385-7; Merl. Aliments, § 2 bis. n. 2; 2. Toul. 3; 1 Delv. 92; C. N. 207. [I. 297.]

169. Maintenance is only granted in proportion to the wants of the party claiming it and the fortune of the party by whom it is due.—Poth. l. c.; Mar. 385, 389, 390; P. Fr. 356-364; C. N. 208. [I. 297.]

170. Whenever the condition of the party who furnishes or of the party who receives maintenance is so changed that the one can no longer give or the other no longer needs the whole or any part of it, a discharge from or a reduction of such maintenance may be demanded.—3 P. Fr. 364; C. N. 209. [I. 297.]

171. If the person who owes a maintenance, justify that he cannot pay an alimentary pension, the court may order such person to receive and maintain in his house the party to whom such maintenance is due.—Poth. Mar. n. 391; Pers. p. 1, t. 6, § 2; Merl. Aliments, § 1; Lah. 71: C. N. 210. [I. 297.]

172. The court likewise decides whether the father or mother, who, although able to pay, offers to receive and maintain the child to whom a maintenance is due, shall in that case be exempted from paying

an alimentary pension.—Poth. Mar. 391, 394, 395; 1 Sœ. cent. 3, c. 100; 2 Desp. 241, n. 67; P. Fr. 366, 369; C. N. 211. [I. 297.]

CHAPTER SIXTH.

OF THE RESPECTIVE RIGHTS AND DUTIES OF HUSBAND AND WIFE.

173. Husband and wife mutually owe each other fidelity, succor and assistance.—Poth. Mar. 380, 382; Merl. Aliments, § 3, n. 5; 1 Marc. 548, n. 724; C. N. 212. [I. 297.]

174. A husband owes protection to his wife; a wife obedience to her husband.—Poth. Mar. 382, 400, P. Mar. n. 1; 1 Toul. 14; 1 Delv. 79; C. N. 213. [I. 297.]

175. A wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessaries of life, according to his means and condition.—Poth. Mar. 382, P. Mar., 1 C. O. t. 10, n. 143; 3 P. Fr. 376; C. N. 214. [I. 297.]

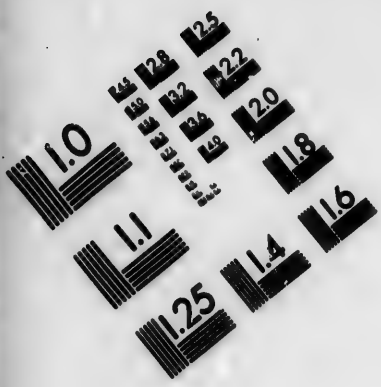
176. A wife cannot appear in judicial proceedings, without her husband or his authorization, even if she be a public trader or not common as to property; nor can she, when separate as to property, except in matters of simple administration.—C. P. a. 224, 234; Poth. Ob. 878, P. Mar. 15, 55, 56, 61, 62, C. O. t. 10, n. 201; 3 P. Fr. 378-387; C. N. 215. [I. 297; III. 373.]

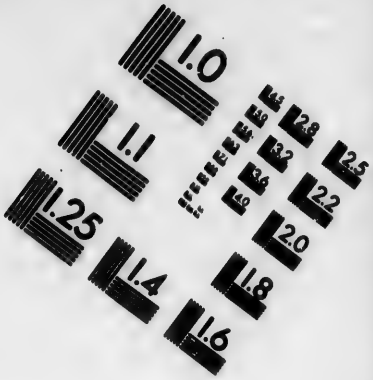
177. A wife even when not common as to property, cannot give nor accept, alienate, nor dispose of property *inter vivos*, nor otherwise enter into contracts or obligations, unless her husband becomes a party to the deed, or gives his consent in writing; saving the provisions contained in the act 25 Vict., chap. 66.—If, however, she be separate as to property, she may do and make alone all acts and contracts connected with the administration of her property. —Poth. Ob. 50, 52, P. Mar. 2, 15, 34, 42, 43, 71, Prop. 7, Com. 522, C. O. t. 15, n. 5; Merl. Autorité marit. s. 2, § 3, n. 2; 3 Mal. 262; 2 Lo. E. C. 510 --; C. N. 217. [I. 297; III. 373.]

178. If a husband refuse to authorize his wife to appear in judicial proceedings or to make a deed, the judge may give the necessary authorization.—C. P. 224; Poth. P. Mar. 12, 57, 59, C. O. t. 10, n. 201; 3 P. Fr. 421-424; Merl. Autorité marit. s. 8, n. 2 --; 5 Toul. 78, 209; C. N. 218. [I. 299.]

179. A wife who is a public trader may, without the authorization of her husband, obligate herself for all that relates to her commerce; and in such case she also binds her husband, if there be community between them.—She cannot become a public trader without such authorization express or implied.—C. P. 235, 236; Poth. P. Mar. 20, 21, 22, C. O. t. 10, n. 196-197; Arr. Lam. t. 32, a. 82; C. N. 220. [I. 299; III. 373.]

180. If a husband be interdicted or absent, the judge may authorize his wife, either





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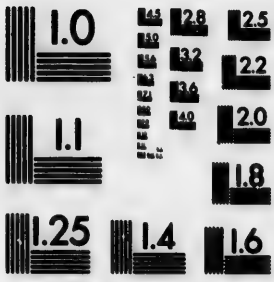

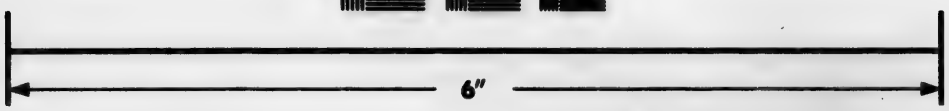

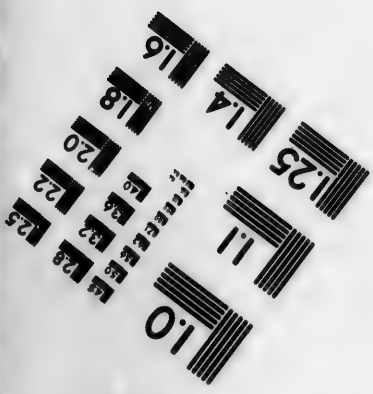

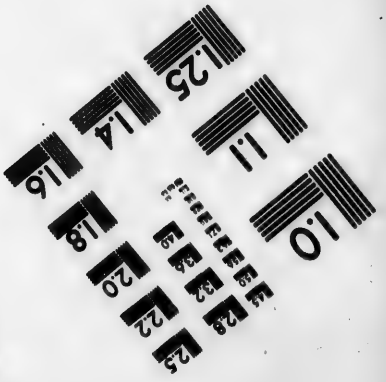

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to appear in judicial proceedings or to contract.—Poth. P. Mar. 25-28; 3 P. Fr. 397, 398; Fen. Poth. on a. 222, p. 57; C. N. 222. [I. 299.]

181. All general authorizations, even those stipulated by marriage contract, are only valid in so far as regards the administration of the wife's property.—Poth. Com. Intr. 5; P. Mar. 67; Den. Ac. de notor. 22 Fév. 1695, 12 Nov. 1699, 23 Fév. 1708; Lepr. cent. 1, c. 67; 3 P. Fr. 435; C. N. 223. [I. 299.]

182. A husband although a minor may, in all cases, authorize his wife who is of age; if the wife be a minor, the authorization of her husband, whether he is of age or a minor, is sufficient for those cases only in which an emancipated minor might act alone.—1 Mal. 208; Lac. Autorisation, n. 6; 3 P. Fr. n. 206, p. 436; 2 Merl. Autorisation, s. 5, § 2, p. 182, 183; C. N. 224. [I. 299.]

183. The want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.—Poth. P. Mar. 74, 75; 2 Merl. Autorisation, 174, 175; 2 Toul. n. 661; 1 Marc. n. 749, n. 1, p. 567; 2 Demo. 436; 3 Zach. 343; 2 Dur. n. 515; 1 Dels. 204; C. N. 225. [I. 299.]

184. A wife may make a will without the authorization of her husband.—Poth. P. Mar. 43, 47; Test. c. 3, s. 1; 3 P. Fr. 442; C. N. 226. [I. 299.]

CHAPTER SEVENTH

OF THE DISSOLUTION OF MARRIAGE.

185. Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble.—Poth. Mar. 462, 467; Gou. on a. 25, 94; 3 P. Fr. 446; 2 Dur. n. 520; C. N. 227. [I. 299.]

TITLE SIXTH.

OF SEPARATION FROM BED AND BOARD.

CHAPTER FIRST.

OF THE CAUSES OF SEPARATION FROM BED AND BOARD.

186. Separation from bed and board can only be demanded for specific causes; it cannot be based on the mutual consent of the parties.—Lac. Séparation, n. 9, p. 639; Poth. Mar. 517; 2 Pi. 200, 213, 240; 1 Mal. 272; 4 P. Fr. 149; C. N. 306. [I. 301.]

187. A husband may demand the separation on the ground of his wife's adultery.—Poth. Mar. 525; 2 Pi. 239; C. N. 229. [I. 301.]

188. A wife may demand the separation on the ground of her husband's adultery, if he keep his concubine in their common habitation.—Cod. L. 8 De repud.; Nov. 22, c. 15, § 1; 117, c. 9, § 5; Lac. Adultère, 13; Guy. Adultère, 196; 2 Pi. 209, 210, 211, 223; Merl. Adultère, 243, n. 8 bis; C. N. 230. [I. 301.]

189. Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other.—2 Pi. 236-9; Gou. 96; 4 P. Fr. 35; C. N. 231. [I. 301.]

190. The grievous nature and sufficiency of such outrage, ill-usage and insult, are left to the discretion of the court which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties.—Poth. 508; 2 Pi. 203; Gou. 96. [I. 301.]

191. The refusal of a husband to receive his wife and to furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation.—Poth. 511; 2 Pi. 205. [I. 301.]

CHAPTER SECOND.

OF THE FORMALITIES OF THE ACTION FOR SEPARATION FROM BED AND BOARD.

192. The action for separation from bed and board is brought before the competent court of the district in which the consorts have their domicile.—Poth. 518; 2 Pi. 214; C. N. 234. [I. 301.]

193. This action is brought, tried and decided in the same manner as all other civil actions, with this difference, that the parties cannot admit the allegations, proof of which must always be made before the court.—Poth. 519; 1 Pi. 228; 2 Pi. 226; 4 P. Fr. n. 127 --, 152; C. N. 307. [I. 301.]

194. The wife must apply, by a petition setting forth her reasons and addressed to the judge, to be authorized to sue, and to be allowed to withdraw pending the suit to a place which she indicates.—Poth. 518; 2 Pi. 216. [I. 301.]

195. If the alleged wrongs be found sufficient, the judge, in according to the wife the authorization to sue, allows her to leave her husband and to reside elsewhere during the suit.—Poth. l. c.; 2 Pi. 218; C. N. 268. [I. 303.]

196. The action for separation from bed and board is extinguished by a reconciliation of the parties taking place either since the facts which gave rise to the action, or after the action brought.—Poth. 520; 2 Pi. 219; C. N. 272. [I. 303.]

197. In either case the action is dismissed. — The plaintiff may nevertheless bring another, for any cause which has happened since the reconciliation, and may in such case make use of the previous causes in support of the new action.—Poth. 520; 2 Pi. 219; C. N. 273. [I. 303.]

198. If the action be dismissed the husband is obliged to take

back his wife, and the wife is obliged to return to her husband, within such delay as the court by its judgment determines.—Poth. 521; 2 Pi. 232; 5 P. Fr. 77. [I. 303.]

199. When the action is brought for outrage, ill-usage, or grievous insult, although the same be well established, the court may refuse to grant the separation forthwith, and may suspend its judgment until a further day, which it appoints in order to afford the parties sufficient time to come to an understanding and reconciliation.—Pi. 231; 2 Dur. n. 610; C. N. 259. [I. 303.]

CHAPTER THIRD.

OF THE PROVISIONAL MEASURES TO WHICH THE ACTION FOR SEPARATION FROM BED AND BOARD MAY GIVE RISE.

200. The provisional care of the children remains with the father, whether plaintiff or defendant, unless the court or judge orders otherwise for the greater advantage of the children.—14 P. Fr. 90, n. 66; Mas. Separation, 151 --; 4 Lo. E. C. 332 --; C. N. 267. [I. 303.]

201. A wife sued in separation may leave her husband's domicile, and reside during the suit in a place indicated or approved of by the court or judge.—Poth. 518. [I. 303.]

202. Whether the wife is plaintiff or defendant, she may demand an alimentary pension, in proportion to her wants and the means of her husband; the amount is fixed by the court, which also orders the husband if necessary, to deliver to the wife at the place to which she has withdrawn, the clothing she may require.—Poth. l. c.; 2 Pi. 216; 2 Dur. n. 595, 612; C. N. 268; F. C. P. 878.

203. [If the wife leave the place of residence assigned to her without the permission of the court or judge, the husband may claim to be liberated from the payment of the alimentary pension; he may even have her action dismissed, saving her recourse, should she refuse to obey the order given her to return within a given delay to the place she has thus quitted.] —2 Dur. n. 578; C. N. 269. [I. 303.]

204. A wife who is in community as to property, whether plaintiff or defendant in an action for separation from bed and board, may, from the date of the order mentioned in articles 195 and 201, obtain permission from the court or judge to cause the moveable effects of such community to be attached for the preservation of the share which she will have a right to claim when the partition takes place; in consequence of which, her husband is bound as judicial guardian, to represent the things seized or their value when required. —2 Toul. 59; 2 Pi. 184; 1 Mal. 250; 4 P. Fr. 94; C. N. 270. [I. 303.]

205. All obligations contracted by a husband, affecting the community, and all alienations made by him of the immoveable property of such community, subsequent to the rendering of the order men-

tioned in articles 195 and 201, are declared null, if it be established that such obligations or alienations were contracted or made in fraud of the rights of his wife.—4 P. Fr. 96; C. N. 271. [I. 305.]

CHAPTER FOURTH.

OF THE EFFECTS OF SEPARATION FROM BED AND BOARD.

206. Separation from bed and board, from whatever cause it arises, does not dissolve the marriage tie; neither husband nor wife, therefore, can contract a new marriage while both are living.—Poth. 523. [I. 305.]

207. The separation relieves the husband from the obligation of receiving his wife, and the wife from that of living with her husband; it gives the wife the right of choosing for herself a domicile other than that of her husband.—Poth. 522; Bouh. C. B. c. 22, n. 201; 2 Toul. n. 773; Proud. C. D. F. c. 19, § 3; Mas. 198; 4 P. Fr. 163. [I. 305.]

208. Separation from bed and board carries with it separation of property; it deprives the husband of the rights which he had over the property of his wife, and gives to the wife the right to obtain restitution of her dowry, and of the property that she brought in marriage. —Unless by the judgment they are declared forfeited, which only takes place in the case of adultery, the separation also gives the wife the right to claim the benefit of all the gifts and advantages conferred on her by the marriage contract; saving the rights of survivorship, to which such separation does not give rise, unless the contrary has been specially stipulated.—Poth. 522; 4 P. Fr. 163, 4; C. N. 311, 1452. [I. 305.]

209. When community of property exists, the separation operates its dissolution, imposes on the husband the obligation of making an inventory, and gives to the wife, in case of acceptance, the right to demand the partition of the property, unless by the judgment she has been declared to have forfeited this right.—Poth. l. c.; 4 P. Fr. l. c. [I. 305.]

210. The separation renders the wife capable of suing and being sued, and of contracting alone, for all that relates to the administration of her property; but for all acts and suits tending to alienate her immoveable property, she requires the authorization [of a judge.]—Poth. l. c.; 4 P. Fr. 164. [I. 305.]

211. For whatever cause the separation takes place, the party against whom it has been declared, loses all the advantages granted by the other party. —2 Pi. 233; 1 N. D. 291; 8 Id. 543; 4 P. Fr. 135, 6; 2 Dur. n. 629; 1 Pail. 110, 11; Lah. on a. 299; Mas. 297, 299, 305, 306; 4 A. D. Révocation, 286; 16 Merl. 61; 2 N. Pi. 571; 1 Mal. 269; C. N. 299, 1452, [I. 305.]

212. The party who has obtained the separation retains all the advantages granted by the other, although they may have been stipulated to be reciprocal and the reciprocity

does not take place.—2 Pl. 233, 234; 4 P. Fr. 135; C. N. 300. [I. 307.]

213. Either of the parties thus separated, not having sufficient means of subsistence, may obtain judgment against the other for an alimentary pension, which is fixed by the court, according to the condition, means and other circumstances of the parties.—Mas. 194; 2 Dur. n. 633; 4 P. Fr. 165, n. 134; 2 Pl. 234; 2 Toul. n. 780; 1 N. D. Aliments, 453; Merl. Aliments, § 3, p. 176; C. N. 301. [I. 307.]

214. The children are entrusted to the party who has obtained the separation, unless the court, after having, if it think proper, consulted a family council, orders, for the greater advantage of the children, that all or some of them be entrusted to the care of the other party, or of a third person.—2 Pl. 233; 9 Fen. T. P. 486; Mas. 321, 322; 1 Pail. 111; 2 Dur. 580, n. 636; 1 Rog. 205; C. L. 153; C. N. 302. [I. 307.]

215. Whoever may be entrusted with the care of the children, the father and mother respectively retain the right of watching over their maintenance and education, and are obliged to contribute thereto in proportion to their means.—2 Pl. 233; 4 P. Fr. 140, 141; C. N. 303. [I. 307.]

216. Separation from bed and board judicially declared does not deprive the children, issue of the marriage, of any of the advantages allowed them by law or by the marriage covenants of their father and mother; but these rights only become open in the same way and under the same circumstances as if there had been no such separation.—4 P. Fr. 142; C. N. 304. [I. 307.]

217. Husband and wife thus separated, for any cause whatever, may at any time reunite and thereby put an end to the effects of the separation.—By such reunion, the husband reassumes all his rights over the person and property of his wife, the community of property is re-established of right and, for the future, is considered as never having been dissolved.—Poth. Mar. 524; C. N. 309. [I. 307.]

TITLE SEVENTH.

OF FILIATION.

CHAPTER FIRST.

OF THE FILIATION OF CHILDREN WHO ARE LEGITIMATE OR CONCEIVED DURING MARRIAGE.

218. A child conceived during marriage is legitimate and is held to be the child of the husband.—A child born on or after the one hundred and eightieth day after the marriage was solemnized, or within

three hundred days after its dissolution, is held to have been conceived during marriage.—Author. under next article. C. N. 312. [I. 307.]

219. The husband cannot disown such a child even for adultery, unless its birth has been concealed from him; in which case he is allowed to set up all the facts tending to establish that he is not the father.—8 N. D. 5 --; ff. L. 6, de h. q. sui vel al; ff. L. 11, § 9, ad leg. jul. de adult.; 3 Hen. l. 6, c. 5, q. 38, p. 850-4; Leb. Suc. l. 1, c. 4, s. 2, n. 6, p. 52; 2 Toul. n. 789; Merl. Légitimité, s. 2, § 2, n. 4, 5; 4 P. Fr. 186, 7; C. N. 313. [I. 309.]

220. Neither can the husband disown the child on the ground of his impotency, either natural or caused by accident before the marriage. He may nevertheless disown it if, during the whole time that it may legally be presumed to have been conceived, he were, by reason of impotency not existing at the time of the marriage, of distance, or of any other cause, in the physical impossibility of meeting his wife. —ff. L. 6, de h. q. sui. vel al.; Leb. Suc. l. 1, c. 4, s. 2, n. 3, 4; 3 Hen. l. 6, c. 5, q. 38, p. 850-854; Merl. Légitimité, s. 2, § 2; Guy. Légitimité, 379 --; 2 Toul. n. 791, 709; 4 P. Fr. 179, 180, 183; C. L. 208; C. N. 312, 313. [I. 309.]

221. A child born before the one hundred and eightieth day after the marriage was solemnized, may be disowned by the husband.—ff. L. 12, de stat. homi.; Cod. L. 4, de posth. hœr; Poth. Suc. 8; Guy. Légitimité, 372; 2 P. Fr. 181; 2 Toul. n. 791; 2 Boi. 62, 66, 67; C. N. 314. [I. 309.]

222. Nevertheless a child born before the one hundred and eightieth day of the marriage, cannot be disowned by the husband in the following cases:

1. If he knew of the pregnancy before the marriage;

2. If he were present at the act of birth, or if that act be signed by him, or contain the declaration that he cannot sign;

3. If the child be not declared viable.—2 Toul. n. 821 --; 4 P. Fr. 188, 9; Merl. Légimité, s. 2, § 1, n. 4; C. N. 314. [I. 309.]

223. [In all the cases where the husband may disown the child, he must do so:

1. Within two months, if he be in the place at the time of the birth;

2. Within two months after his return, if absent at the time of the birth;

3. Within two months of the discovery of the fraud, if the birth have been concealed from him.]—C. N. 316; C. L. 210. [I. 309.]

224. [If the husband die before disowning the child, but still being within the delay allowed for so doing, the heirs have two months to contest the legitimacy of the child from the time he has taken possession of the property of the husband, or from the time that the heirs have been disturbed by him in their possession.]—C. N. 317; C. L. 211. [I. 309.]

225. [Such disavowal, on

the part of the husband or of his heirs, must be made by an action at law, directed against the tutor, or tutor *ad hoc*, appointed to the child, if he be a minor; and the mother, if living, must be made a party to the action.]—2 Marc. 22; 5 Demol. n. 164, 170, 365; 4 P. Fr. 192, 3; 5 Loc. E. C. 112--; Rog. on a. 318; 2 Boi. 88; 2 Toul. n. 842, 3; C. N. 318. [I. 309.]

226. If the disavowal do not take place, [as prescribed in the present chapter], the child which might have been disowned is held to be legitimate.—(Consequence *contrario* of this chapter.) [I. 311.]

227. A child born after the three hundredth day from the dissolution of the marriage is held not to be the issue thereof and is illegitimate.—(Author. under a. 219.) ff. L. 3, § 11, de suis et legit. hær; Fer. D. Naissance; Guy. e. v.; Fer. C. P. a. 118, gl. 3, s. 2, § 1, n. 22-24; Leb. Suc. l. 1, c. 4, s. 1, n. 12; Merl. Légitimité, s. 2, § 3; 2 Fav. de Lang. conf. on a. 315, p. 273; 1 Mal. 280; C. N. 315. [I. 311.]

CHAPTER SECOND.

OF THE EVIDENCE OF THE FILIATION OF LEGITIMATE CHILDREN.

228. The filiation of legitimate children is proved by the acts of birth inscribed in the registers of civil status.—ff. L. 14 de prob.; Cod. L. 15 de prob.; C. S. L. C. c. 20, § 13; C. N. 319. [I. 311.]

229. In default of such act, the uninterrupted possession of the status of a legitimate child is sufficient.—Cod. L. 9, de nupt.; 4 Dag. 47th Pl.; 2 Coch. 43--; 2 Desp. 35; 3 P. Fr. 198, 9; C. L. 213; C. N. 320. [I. 311.]

230. Such possession is established by a sufficient concurrence of facts, indicating the connection of filiation and relationship between the individual and the family to which he claims to belong.—Cod. L. 9 de nupt.; N. D. Etat, 9--; 1 Bour. 17, 18; 2 Coch. 43--; 2 Dag. 256; 2 Toul. n. 871--; 5 Loc. E. C. 125--; C. N. 321. [I. 311.]

231. No one can claim a status contrary to that which his act of birth, accompanied with the possession conformable to such act, gives him; and reciprocally no one can contest the status of him who has a possession conformable to his act of birth.—2 Coch. 107; 4 Coch. 345; N. D. Etat, (Q. d') 9; 2 Toul. n. 881; 5 Demol. n. 219; 3 P. Fr. 200; C. N. 322. [I. 311.]

232. In default of the act of birth and of an uninterrupted possession, or if the child have been described either under false names, or as being the child of unknown parents, the proof of filiation may be made by testimony; nevertheless this evidence can only be admitted when there is a commencement of proof in writing, or when the presumptions or indications resulting from facts then ascertained, are sufficiently strong to permit its admission.—Cod. L. 2 de test.; L. 6 de fide instr.; L. 9 de nupt.;

Arr. 16 Mar. 1641; O. 1667, t. 20, a. 14; Guy. Légitimité, s. 2, § 4, n. 5; 4 Coch. 344, 346, 483, 486; Lac. Etat, 270; C. S. L. C. c. 20, s. 13; Merl. Naissance; Id. Q. d'état, § 1 --; 2 Toul. n. 883; 4 P. Fr. 201, 2; 5 Lo. 140, 1; C. N. 323. [I. 311.]

233. A commencement of proof in writing results from the title-deeds of the family, the registers and papers of the father and mother, from public and even private writings proceeding from a party engaged in the contestation, or who would have had an interest therein had he been alive.—ff. L. 29, de prob.; O. 1667, t. 20, a. 14; 5 Lo. 141-3; 2 Toul. n. 890 --; Rod. 1667, t. 20, a. 14; C. S. L. C. c. 20, s. 13; 4 P. Fr. 203: C. N. 324. [I. 313.]

234. Proof of the contrary may be made by any means of a nature to establish that the claimant is not the child of the mother he claims to have, or even, the maternity being proved, that he is not the child of the husband of such mother.—C. S. L. C. c. 20, a, 13; 1 Jou. O. 1667, t. 20, a. 1, p. 344; 2 Toul. n. 820, 893 --; 4 P. Fr. 204, 5; C. L. 216; C. N. 325. [I. 313.]

235. The action of a child to establish his status is imprescriptible.—2 Toul. n. 908; 2 Marc. 35, 36; Lah. on a. 328; C. N. 328. [I. 313.]

236. This action cannot be brought by the heirs of a child who has failed to bring it, unless he died in minority, or within five years after his majority; but they may continue the action already brought.—ff. L. 1, ne de stat. def.; Dun. p. 2, c. 7, p. 159 --; 2 Hen. l. 4, q. 28; Lac. 270, 1, Etat, n. 4; 2 Marc. 36 --; 1 Bi. Exp. 102; 2 Toul. n. 911 --; Merl. Légitimité, s. 4, § 1, n. 1, p. 471 --; C. N. 329. [I. 313.]

CHAPTER THIRD.

OF ILLEGITIMATE CHILDREN.

237. Children born out of marriage, other than the issue of an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother.—Poth. Mar. n. 408, 411, 412, 415, 422, Pers. t. 4, p. 601, 602, Suc. s. 2, c. 1, a. 3, § 5, p. 20; Fen. Poth. on a. 331, p. 77, 78; 2 Toul. n. 924; 1 Bi. Code Civil, 104; 2 P. Fr. 80; 2 Marc. 43; C. L. 217; C. N. 331. [I. 313.]

238. Such legitimation takes place even in favor of the deceased children who have left legitimate issue, and in that case it benefits such issue.—Inst. de hœr q.; Poth. Mar. n. 413, Suc. s. 2, a. 3, § 5, q. 4, p. 23; 2 P. Fr. 87; 4 Ib. 223, 4; 2 Toul. n. 931 --; C. L. 218; C. N. 332. [I. 313.]

239. Children legitimated by a subsequent marriage have the same rights as if they were born of such marriage.—Poth. Mar. n. 421; Id. Suc. c. 1, s. 2, a. 3, § 5, q. 4; Leb. Suc. n. 16, 17, p. 24; 2 Toul. n. 929; 2 Marc. 48; 4 P. Fr. 225-228; C. L. 219; C. N. 333. [I. 313.]

240. The forced or voluntary acknowledgment by the father or mother of their illegitimate child, gives the

latter the right to demand maintenance from each of them according to circumstances.—Lac. Batard, n. 6; Guy. Aliments, 318; 2 Boi. 122; 2 P. Fr. 229; C. N. 338. [I. 313.]

241. An illegitimate child has a right to establish judicially his claim of paternity or maternity, and the proof thereof is made by writings or testimony, under the conditions and restrictions set forth in articles 232, 233 and 234.—Four. S. 129 --; Merl. Filiation, n. 2; 2 Toul. n. 937, 967; 1 Gin, 197 --; C. N. 340, 341. [I. 315.]

TITLE EIGHTH.

OF PATERNAL AUTHORITY.

242. A child, whatever may be his age, owes honor and respect to his father and mother.—ff. L. 9, de obs.; L. 6, de in jus voc.; Nov. 12, c. 9; Poth. Mar. n. 389, Pers. 604; 3 Dom. 16; 4 P. Fr. 317; Poc. Puis. pat. 30; 1 Gin, 220; C. L. 233; C. N. 371. [I. 315.]

243. He remains subject to their authority until his majority or his emancipation, but the father alone exercises this authority during marriage; saving the provisions contained in the act 25 Vict. chap. 66.—ff. l. 50, t. 16, L. 196; Inst. l. 1, t. 2 and 12; Poth. Mar. n. 389, 390, Pers. 604-5, Intr. t. 9, n. 2; Arr. Lam. t. 2, a. 1 --; 2 Toul. n. 1041-6-9, 1176; 2 P. Fr. 305; 4 P. Fr. 324, 327 --; C. L. 234; C. N. 372, 373. [I. 315.]

244. An unemancipated minor cannot leave his father's house without his permission.—Poth. Pers. t. 6, s. 2; Merl. Puis. pat. s. 3, § 6; 2 Toul. n. 1046-7; Poc. 32; 4 P. Fr. 328; C. L. 236; C. N. 374. [I. 315.]

245. The father and, in his default, the mother of an unemancipated minor have over him a right of reasonable and moderate correction, which may be delegated to and exercised by those to whom his education has been entrusted.—Poth. Pers. 605; Poc. 32; 5 J. A. l. 12, c. 25; Dou. Can. Abs. 85; Arr. Lam. t. 3, a. 18; Cug. 121; Poth. Garde 371; N. D. Garde, 183, 201; 2 Toul. 1050; Fen. Poth. 85; 1 Gin, 224, 227, 240, 242; 4 P. Fr. 350 --, 357-8; C. L. 236; C. N. 375. [I. 315.]

TITLE NINTH.

OF MINORITY, TUTORSHIP AND EMANCIPATION.

CHAPTER FIRST.

OF MINORITY.

246. Persons of either sex remain in minority until they attain the full age of twenty-one years.—C. S. L. C. c. 34, s. 1; 4 P. Fr. 474; 10 Fen. 544--; C. N. 388. [I. 315.]

247. Emancipation only modifies the condition of the minor; it does not put an end to the minority, nor does it confer all the rights resulting from majority.—Guy. Emancipation, 659, 660. [I. 315.]

248. The disabilities, rights and privileges resulting from minority, the acts the minor may do and the suits he may bring, the cases in which he may demand to be relieved, the manner and time of making the demand, and other like questions, are determined in the third book of the present code, and in the Code of Civil Procedure. [I. 317.]

CHAPTER SECOND.

OF TUTORSHIP.

SECTION I.

Of the appointment of tutors.

249. All tutorships are dative; they are conferred on the advice of a family council, by a competent court or by any judge of such court, having civil jurisdiction in the district where the minor has his domicile, or by the prothonotary of such court.—Poth. Intr. t. 1, t. 9, n. 183; Mes. Min., 8, 77, 85, 86, 133; 1 Bour. 47; Guy. Tut. 313; Lam. Tut. 8; Poth. Pers. 610; Lac. Tut. s. 4, n. 1, 2; 2 Pi. 303; 1 Pi. 71; 34 Geo. III. c. 6, s. 9; 12 V. c. 38, s. 74; 14 & 15 V. c. 58; 16 V. c. 91; 18 V. c. 17; C. S. L. C. c. 86; 1 Mal. 360; 4 P. Fr. 392, 509; Merc. de tut. 5; Del. 15 Dec. 1721; Del. 1 Oct. 1741; C. S. L. C. c. 78, s. 23; C. N. 405. [I. 317.]

250. The convocation of a family council may be demanded by all those related or allied to the minor, without regard to the degree of relationship, by the subrogate-tutor, by the minor himself in certain cases, by his creditors, and by all other persons interested.—Arr. Lam. t. 4, a. 3, p. 8; Poth. Intr. t. 9, § 3, p. 269; Id. Pers. t. 6, s. 4, § 2, p. 610; 2 Pi. 301-3; Mes. 89; 17 Guy. 316; 2 Boi. 336; 7 Demol. n. 281, 2; C. N. 406. [I. 317.]

251. The persons to be called to a family council are those most nearly related or allied to the minor, to the number of seven at least, and taken, as equally as possible, from both the paternal and the maternal line.—ff. L. 2 Qui pet. tut.; Arr. Lam. t. 4, a. 4, p. 8, Rav. 5; Poth. Intr. t. 9, n. 11; Id. Pers. t. 6, s. 4, a. 1, § 2; 2 Pi. 303; Mes. 91; 17 Guy. 317; C. N. 407. [I. 317.]

252. With the exception of the mother and other female ascendants during widowhood, the relations must be males, of the full age of twenty-one years, and residing in the district where the appointment of a tutor is to be made.—Lam. Arr. t. 4, a. 4, p. 8; 2 Pi. 303; 4 P. Fr. 513; C. N. 408. [I. 317.]

253. If, however, a sufficient number be not found in the district, they may be taken in other districts, and even in default of relations of both lines, the friends of the minor may be called to form or to complete the number required.—Arr. Lam. t. 4, a. 4; Poth. Pers. 610; 2 Pi. 303; 17 Guy. 318; 2 Boi. 351; C. N. 409. [I. 317.]

254. Persons related or allied to the minor, qualified to make part of the family council, and who have not been called, have a right to attend, and to give their advice as if they had been called.—2 Pi. 303. [I. 319.]

255. The judge or prothonotary, on petition of a competent person, calls before him the relations, connections, or friends of the minor who are to compose the family council, and for this purpose, grants an order which is notified to the parties at the instance of the person seeking the convocation.—C. S. L. C. c. 86, s. 2, 10; c. 78, s. 23. [I. 319.]

256. If the persons to be called reside at a greater distance than five leagues, the court, judge or prothonotary may, if requested, authorize a notary or other competent person to hold such family council at the place where such parties reside, to administer the necessary oath, to take their advice on the appointments to be made, and even to administer the oath of office to the tutor chosen.—C. S. L. C. c. 78, s. 23; c. 86, s. 2,3. [I. 319.]

257. In every case in which, according to the preceding articles, a judge may call before him, or delegate the right to call a family council, it is lawful for any notary, residing or present at the place where the meeting is to be held, without regard to distance, to call it himself without the authorization of the judge, and to act therein in the same manner in every respect as if he had been delegated by the judge.—C. S. L. C. c. 86, s. 5, 9. [I. 319.]

258. The notary can, however, act in conformity with the preceding article, only when he is requested to do so by one of those at whose instance such council might have been called before a judge; and in such case, the petitioner makes a declaration before the notary, of the object and motives of his demand, in the same manner as if it were addressed to a judge. Of this declaration the notary must draw up an act in writing.—C. S. L. C. c. 86, s. 6. [I. 319.]

259. Family councils thus called by notaries, are composed in the same manner as those called before a judge. It is only in default of persons

related or allied to the minor, that his friends are admitted, and this default must be verified by the notary, and mentioned in his report.—C. S. L. C. c. 86, s. 7. [I. 319.]

260. The declaration required by article 258 is first read to the family council; the notary takes their advice and draws up an act in writing of their deliberation, which act must mention the oppositions that were made, and the different opinions which were given, as also the quality, place of residence, and degree of relationship of those who composed the meeting.—C. S. L. C. c. 86, s. 7, 8. [I. 319.]

261. In all cases where a family council is called and held by a notary, whether delegated by a judge or prothonotary or not, such notary is bound to make a complete and circumstantial report of his proceedings to the proper court or judge, or prothonotary, accompanied with the acts and declarations that it is his duty to draw up.—C. S. L. C. c. 86, s. 2, 7, 9; c. 78, s. 23. [I. 321]

262. The court, judge or prothonotary receiving this report, may homologate or reject the proceedings therein contained, which, without homologation, produce no effect. They may likewise make any order relative such proceedings that they deem advisable, in the same manner as if the family council had been called before them.—C. S. L. C. c. 86, s. 2, 8; c. 78, s. 23. [I. 321.]

263. In all cases where a tutor has been appointed out of court, the court may, on the petition of any one entitled to have a meeting of the family council called, and after having heard the tutor, cancel his appointment and order a new one.—2 Pl. 307, 8; C. S. L. C. c. 86, s. 4. [I. 321.]

264. One tutor only is named to each minor, unless he has immoveable property in places remote from one another, or in different districts, in which cases a tutor may be appointed for each place or district wherein such immoveable property is situated. These tutors are independent of one another; each of them is only liable for that portion of the property which he has administered.—The tutor of the domicile of the minor has the care of his person.—Nevertheless, in certain cases, a separate tutor may be appointed to the person of the minor.—The mother or other female ascendant, who has remarried, may also be appointed joint-tutor with her second husband.—Arr. Lam. t. 4, a. 15, 16; Poth. Intr. t. 9, n. 12; Mes. 98; 4 P. Fr. 462; C. N. 417. [I. 321.]

265. A tutor acts and administers, as such, from the time of his appointment, if it take place in his presence, otherwise from the time of his being notified of it.—ff. L. 1, § 1, De adm. et peri. tut.; Poth. Intr. t. 9, n. 13; Arr. Lam. t. 4, a. 56-9; C. L. 297; C. N. 418. [I. 321.]

266. Tutorship is a personal office which does not pass to the heirs of the tutor. They are simply responsible for his

administration. If they be of age, they are bound to continue such administration until a new tutor is appointed.—1 Bour. 70; Mes. 221; C. N. 419. [I. 321.]

SECTION II.

Of Subrogate-Tutors.

267. In every tutorship there must be a subrogate-tutor, whose appointment is made by the same act, and in the same manner, and is subject to the same revision as that of the tutor. His duties consist in causing the act of tutorship to be registered, being present at the inventory, watching over the administration of the tutor, causing his removal if there be ground for it, and in acting for the interests of the minor whenever they are opposed to those of the tutor.—C. P. 240; Poth. Pers. 626-7; Arr. Lam. t. 4, a. 11, Mes. 103, 170; 4 A. D. 576. 1 Mal. 383; 4 P. Fr. 522; 2 Toul. n. 11, 28--; C. L. 300, 301; C. N. 420, 422; C. S. L. C. c. 37, s. 31. [I. 323.]

268. The subrogate-tutor does not of right replace the tutor, when the tutorship becomes vacant, or when the tutor becomes incapable of acting by absence or any other cause, but in these cases it is his duty to have a new tutor appointed, and in default of so doing, he is liable to pay the damages which may result to the minor from his neglect.—Mes. 653; C. N. 424. [I. 323.]

269. If during the tutorship a minor happen to have any interests to discuss judicially with his tutor, he is for such case given a tutor *ad hoc* whose powers extend only to the matters to be so discussed. —2 Lan. 148; 1 Pi. 71; Fen. Poth. 95-6; Den. Ac. de not. 473; 16 Merl. Subr. tut. 450. [I. 323.]

270. The functions of a subrogate-tutor cease in the same manner as those of a tutor.—4 P. Fr. 526; 2 Toul. n. 1136; C. N. 425. [I. 324.]

271. The provisions contained in sections three and four of the present chapter, apply to subrogate-tutors.—C. N. 426. [I. 323.]

SECTION III.

Of the causes which exempt from Tutorship.

272. No one is bound to accept a tutorship, unless he has been called to the family council which elected him.—Mes. 268; Arr. 14, Jan. 1641; 9 Mar. 1714; Lap. 515; Poth. Pers. 610; 1 Mal. 382; 4 P. Fr. 549, 550. [I. 323.]

273. He who is neither related nor allied to the minor cannot be compelled to accept the tutorship, if any one who is related or allied be in a position to take charge of it.—Ser. Inst. t. 25, § 10; Poth. Pers. 610; 1 Bous. 526; 4 P. Fr. 536; C. N. 432. [I. 323.]

274. Any person of the age of seventy years complete may refuse to be appointed tutor. He who has been appointed before he was of that age, may be discharged when he has attained it.--Cod. L. un. q. æt. se

excus; Inst. l. 1, t. 25, § 13; 1 Arg. 53; Lac. Tuteur, 778; Arr. Lam. t. 4, a. 37; 4 P. Fr. 537; 6 Lo. E. C. 163,4; C. N. 433. [I. 323.]

275. Persons laboring under serious and habitual infirmity are exempt from being tutors; they may even obtain their discharge if such infirmity supervene after their appointment.—Cod. L. un. q. morb. se excus.; ff. L. 11, 40, de excus. tut.; Poth. Pers. 612; Id. C. O. t. 9, n. 14; 1 Arg. 53; Arr. Lam. t. 4, a. 37; 4 P. Fr. 539; C. L. 317; C. N. 434. [I. 323.]

276. [Two] tutorships are, for any person, a sufficient reason for refusing to accept a third, other than that of his children. A husband or father, who is already charged with one tutorship, is not bound to accept a second, unless it is that of his own children.—ff. L. 2, L. 3, de excus. tut.; Arr. Lam. t. 4, a. 48, p. 16; Poth. C. O. t. 9, n. 14; Id. Pers. 612; Lac. Tuteur, 778; C. N. 435. [I. 325.]

277. Those who have five legitimate children are exempted from any tutorship but that of their own children. Children who have died leaving issue still living, are counted in this number.—Poth. C. O. t. 9, n. 14; Id. Pers. 612; 1 Bous. 530; Arr. Lam. t. 4, a. 44-6; 6 Lo. E. C. 174; 4 P. Fr. 544-5; C. N. 436. [I. 325.]

278. The birth of children during tutorship does not authorize its abandonment.—Poth. l. c.; Arr. Lam. t. 4, a. 46, 53; 1 Bous. 532; C. N. 437. [I. 325.]

279. If the person who has been elected by a family council be present, he is bound, under pain of forfeiting his grounds of exemption, to state them, in order that their validity may be determined at once, when the proceeding takes place before a court, judge or prothonotary, or in order that they may be reported to the court, judge or prothonotary by the notary or person delegated, if it be before either of these that the family council has been called.—Lam. t. 4, a. 56; Fer. Tutelles, 123; Mes. 269; C. N. 438; C. S. L. C. c. 78, s. 23. [I. 325.]

280. If the person elected be not present, a copy of the act of election is served upon him, and he is bound, within five days, and under pain of forfeiting his grounds of exemption, to lodge them in the office of the court before which, or before the judge or prothonotary of which the proceedings were had, or in the hands of the notary or party delegated, if it be before either of these that the family council was called, in order that the matter may be dealt with in conformity with the preceding article.—Arr. Lam. a. 56, t. 4; C. S. L. C. c. 78, s. 23; C. N. 439. [I. 325.]

281. The decision given as to the validity of such grounds by the judge or the prothonotary, out of court, is subject to revision by the court, whose judgment may also be appealed

from; but during the litigation, the person elected is obliged to administer provisionally; and all his acts of administration are valid, even if he be afterwards discharged from the tutorship.—C. 263; Lam. a. 58, 59; C. S. L, C. c. 86, s. 4; Ib. c. 78, s. 23; C. N. 440. [I. 327.]

SECTION IV.

Of Incapacity, Exclusion and Removal from Tutorship.

282. The following persons cannot be tutors:

1. Minors, except the father who is bound to accept the office, and the mother, who although a minor, has a right to the tutorship of her children, but is not bound to accept it;

2. Interdicted persons;

3. Women, other than the mother and female ascendants, who are entitled, during their widowhood and in the case provided for in the last paragraph of article 264, to the tutorship of their children and grandchildren, but are not bound to accept it;

4. All those who themselves or whose father and mother have against the minor a suit at law involving his status, his fortune, or an important portion of it.—Poth. Pers. 602, 611; Arr. Lam. a. 23-27, 36, 42; Nov. 111, c. 5; Fer. Tut. 56; Mes. 245, 247, 252-3; A. D. Tutelle, 769; 2 Pi. 306; 1 Bous. 537, 8; 1 Mal. 398, 9; 4 P. Fr. 444-5; C. N. 442. [I. 327.]

283. Mothers and grandmothers who have been appointed to a tutorship during their widowhood, are deprived of it from the day on which they contract a second marriage; and if the minors have not been provided with another tutor prior to such marriage, the husbands of such mothers or grandmothers remain responsible for the administration of the property of the minors during the second marriage, even if there be no community.—Arr. Lam. a. 29, 32; Mes. 112, 114. [I. 327.]

284. Condemnation to an infamous punishment carries with it by law exclusion from tutorship; it also entails removal from a tutorship previously conferred.—Lam. a 36; Mes. 226, 7; Ser. Instit. 86; Lar. l. 4, t. 9, a. 4; 1 Bous. 539; 4 P. Fr. 559; C. N. 443. [I. 327.]

285. The following persons are also excluded from tutorship, and even may be deprived of it when they have entered upon its duties:

1. Persons whose misconduct is notorious;

2. Those whose administration exhibits their incapacity or dishonesty.—ff. L. 5, L. 8. de susp.; Poth. Pers. 621; Mes. 226-8; 1 Bous. 539 --; 4 P. Fr. 560; C. N. 444. [I. 329.]

286. Actions for the removal of tutors may be brought before the court, by any one related or allied to the minor, by the subrogate-tutor, or by any other person having an interest in such removal.—Lam. a. 115; Mes. 229; 12 V. c. 38, § 14; 1 Bous. 542-3-6; 4 P. Fr. 563; C. N. 446, 448. [I. 329.]

287. The removal of a tutor can only be ordered upon the advice of a family council, which is composed in the same way as for his appointment, and is called in such manner as the court directs.—Lam. a. 115; Mes. 229; 1 Bous. 543; 4 P. Fr. 564-5. [I. 329.]

288. The judgment of removal must contain the grounds on which it is founded, and order the rendering of an account and the appointment of a new tutor, who is appointed with the usual formalities so soon as the judgment becomes executable either by acquiescence, by want of appeal in due time, or by its being confirmed in appeal.—C. S. L. C. c. 83, s. 39; C. N. 447. [I. 329.]

289. During the litigation, the tutor sued retains the management and administration of the person and of the property of the minor, unless the court orders otherwise.—Lam. a. 116; 1 Bour. 70, n. 197; 1 P. Poul. 341; 2 Toul. 355; 4 P. Fr. 564-6; 2 Boi. 391; 1 Bous. 546; 2 Val. Proud. 350, *n.* a; 7 Demol. 301; 1 Mal. 397. [I. 329.]

SECTION V.

Of the administration of tutors.

290. A tutor has the care of the person of his pupil, and represents him in all civil acts.—He is bound to manage his property like a prudent administrator, and is liable for the damages which may result from bad management.—He can neither buy the property of his pupil, nor take it on lease, nor accept the transfer of any right or any debt against his pupil.—Poth. Pers. 614,620; Id. Prop. n. 7, 266; Id. C. O. t. 9, n. 15; A. D. Tutelle, n. 61-4; 1 Arg. 71; 1 Bous. 549, 550, 551, 553, 554; 4 A. D. 772-4; Fen. Poth. 103; 4 P. Fr. 565, 6; Mes. 153-4; Nov. 72, c. 5; Lam. t. 4, a. 91, 96; L. & B. let. T. n. 4; 6 Coch. 528; C. N. 450. [I. 329.]

291. A tutor as soon as his appointment is known to him, and before acting under it, must make oath to well and truly administer the tutorship.—Cod. L. 27, De epis. et cler.; 1 Arg. 55-56; 4 A. D. 772; Lam. t. 4, a. 57; Poth. Pers. 618; Id. C. O. t. 9, n. 13; O. 1579; Pap. l. 15, t. 5, a. 4; 4 P. Fr. 565. [I. 331.]

292. As soon as he has taken the oath, the tutor demands the removal of seals, if they have been affixed, and proceeds forthwith to the taking of an inventory of the property of the minor, in presence of the subrogate-tutor.—If any thing be due to him by the minor, the tutor must declare it in the inventory, on pain of forfeiting his claim.—Poth. Pers. 618; Lam. a. 60, 63, 65; Mes. 122,3; 1 Arg. 56; Lac. Tuteur, n. 4, p. 781. Dom. l. 2, t. 1, s. 3, n. 10; 1 Gin, 322; C. N. 451. Nov. 72, c. 4; Pap. l. 15, t. 5, n. 2; 1 Frem. Tutelles, n. 208; 4 A. D. 772, n. 65; 2 Hen. 311-2; Lam. t. 4, a. 68; 1 Bous. 556; 1 Gin, 323; 2 Proud. 357-359; C. N. 451. [I. 331.]

293. Within the month which follows the closing of the inventory, the tutor causes all the moveable effects, except those which he is allowed or bound to keep in kind, to be sold by public auction, in presence of the subrogate-tutor, and after due publications, which must be mentioned in the minute of sale. Cod. L. 22, L. 24, De admin. tut; O. 1560, a. 102; Ser. 78; Lam. t. 4, a. 70; 4 A. D. 772,3; 2 Hen. l. 4, q. 112; Mes. 136; 1 Gin, 323; 4 P. Fr. 574; C. N. 452. [I. 331.]

294. Within the six months which follow such sale, the tutor, after discharging the debts and other liabilities, must invest whatever money remains in his hands, whether it proceeds from the sale, or is found upon making the inventory, or is subsequently received from the debtors of the minor.—1 Arg. 57; Lam. a. 90; Poth. Pers. 619; 4 A. D. 772--; 1 Gin, 325-6. [I. 331.]

295. During the tutorship, he must likewise invest the excess of the revenues over the expenses, as well as all capital sums which have been reimbursed and all other moneys which he has received, or ought to have received; and this he must do within the same delay of six months from the day when he had or ought to have had a sufficient sum, considering the means and condition of the minor, to form a suitable investment.—ff. L. 15, De admin. tut.; Lam. a. 99-104; 1 Arg. 58; Mes. 164; Poth. Pers. 619, 620; 4 A. D. 772--; 1 Gin, 326. [I. 331.]

296. In default of the tutor having made, within the delays, the investment required, he is bound to account to his pupil for interest on the sums which he ought to have so invested, unless he can establish that such investment was impossible, or unless, on his application, the judge or the prothonotary, upon the advice of a family council, has dispensed with the investment or prolonged the delays.—1 Arg. 57,8; Poth. Pers. 619, 620; Lam. a. 99, 102; 4 A. D. 773, n. 66,7; Mes. 161--; 2 Pi. 112; Lepr. cent. 1, c. 52; 1 Gin, 326; D. 96, *n.* a; C. S. L. C. c. 78, s. 23.[I. 331.]

297. Without the authorization of the judge, or the prothonotary, granted on the advice of a family council, the tutor is not allowed to borrow for the minor, nor to alienate or hypothecate his immoveable property; nor is he allowed to make over or transfer any capital sums belonging to the minor, or his shares and interest in any financial, commercial, or manufacturing joint-stock company.—Cod. L. 4, de praed. et al. reb.; Fer. Tutelles, 226 --; Mes. 144 --; 1 Arg. 60, 61; Lam. a. 87, 88; Poth. Ob. n. 76, Vente, n. 14, Pers. t. 6, s. 4, a. 3, 4; C. O. t. 9, n. 16, t. 15, n. 6, Prop. n. 222-5; 1 Bous. 565; 4 P. Fr. 586; C. S. L. C. c. 78, s. 23; C. N. 457. [I. 333.]

298. Such authorization can only be granted in cases of necessity or for an evident advantage.—In the case of ne-

cessity, the judge or prothonotary grants his authorization only when it is established by a summary account submitted by the tutor, that the moneys, moveable effects and revenues of the minor are insufficient.—In all cases, the authorization indicates what property is to be sold or hypothecated, and any conditions deemed expedient.—C. S. L. C. c. 78, s. 23. [I. 333.]

299. The sale, although authorized, must, in order to be valid, be made judicially, in presence of the subrogate-tutor, to the highest bidder, by public auction before the court, judge, prothonotary, or any other person specially appointed for that purpose, and after publications made at such times and places as are named by the judgment authorizing it.—Poth. Pers. 617, C. 9. t. 9, n. 16; Fer. Tutelles, 226, 227, 232; Mes. 144; 1 Arg. 60, 61; 1 Mal. 411; 1 Bous. 567; C. S. L. C. c. 78, s. 23; C. N. 459. [I. 333.]

300. The formalities required by articles 298 and 299 for the alienation of the property of a minor, do not apply to cases where a judgment, on the demand of a coproprietor, has ordered the licitation of undivided property. But in these cases, the licitation can only be made in the form prescribed by law. Strangers are admitted to bid.—Poth. Pers. 617, Vente n. 516, Soc. n. 171, Com. n. 710; 4 P. Fr. 588; C. N. 460. [I. 333.]

301. [A tutor cannot accept or renounce a succession, which falls to his pupil, without authorization being granted on the advice of a family council. The acceptance can only be made under benefit of inventory. Accompanied by these formalities the acceptance or renunciation has the same effect as if made by a person of age.]—Poth. Pers. 616; Suc. 135; 2 Frem. Tutelle, 3; 1 Gin, 334; 2 Toul. 394; 1 Delv. 125; Mont. 143; 2 Cha. Suc. 30; C. N. 461. [I. 335.]

302. [In any case where a succession renounced in the name of a minor has not been accepted by any one else, it may be afterwards accepted either by the tutor duly authorized on the advice of a family council consulted anew, or by the minor become of age; but it is so taken in the state in which it is then, and the sales or other acts legally made during the vacancy cannot be questioned.]—2 Frem. Tutelle, 2, 3; 4 P. Fr. 490 --; 1 Mal. 412, 3; 6 Lo. E. C. 280, 1; 1 Bous. 572; 1 Zach. 438; C. N. 462. [I. 335.]

303. Gifts made to a minor may be accepted by his tutor, or a tutor *ad hoc*, or by his father, mother, or other ascendants; such acceptance being valid without the advice of any family council.—O. 1731, s. 7; Mes. 393; 1 Ric. Don. 195; 1 Sal. O. 1731, p. 45 --; C. N. 463. [I. 335.]

304. Actions belonging to a minor are brought in the name of his tutor, except those for wages, which minors when of the age of fourteen years may bring alone to the amount of

[fifty] dollars. — No action brought by a tutor can be maintained unless he shows that the act of tutorship has been registered.—C. S. L. C. c. 82, s. 35; c. 37, s. 33; c. 94, s. 21; 1 Pi. 67. [I. 335.]

305. A tutor cannot demand the definitive partition of the immoveable property of the minor, but he can, even without authorization, defend an action of partition brought against such minor.—Poth. Com. n. 695, 6, Soc. n. 164, Pers. t. 6, s. 4, a. 3, § 2; Lam. t. 6, a. 111; Leb. Suc. l. 4, c. 1; 1 Mal. 414, 5; 4 P. Fr. 599, 600. [I. 335.]

306. A tutor cannot appeal from a judgment, until he is authorized by the judge, or the prothonotary, on the advice of a family council.—O. April, 1560; Mes. 44; Lo. E. C. 290. [I. 335.]

307. [A tutor cannot transact in the name of the minor unless he is authorized by the court, the judge or the prothonotary, on the advice of a family council. Accompanied by these formalities, transaction has the same effect as if made with a person of age.]—C. N. 467. [I. 335.]

SECTION VI.

Of the account of tutorship.

308. Every tutor is accountable for his administration when it has terminated.—ff. L. 1, § 3. De tut. et ratio.; Nov. 72, c. ult.; O. 1667, t. 29; Poth. Pers. 622, C. O. t. 9, n. 17; O. 1560; 2 Pi. 27; 1 Bous. 580; 1 Mal. 417; 1 Gin, 339; C. N. 469. [I. 337.]

309. Any tutor may be compelled, even during the tutorship, on the demand of any one related or allied to the minor, of the subrogate-tutor, or of any other parties interested, to produce from time to time, a summary account of his administration; such account to be furnished without any judicial formality or costs.—ff. L. 5, § 11. De reb. eor.; 2 L. & B. let. M, som. 15, p. 170; Ser. O. 1667, t. 29, p. 535; Lac. Tuteur, s. 8, p. 784; Mes. 200; P. Poul. 297; Rav. 557; 2 Pi. 104 --; 1 Bour. 62; 1 Mal. 418; 1 Gin, 341; C. N. 470. [I. 337.]

310. The definitive account of a tutorship is rendered at the cost of the minor, when he has attained his majority, or has been emancipated; the tutor advances the costs of such account.—He is allowed all the expenses which he can justify, and of which the object was useful.—O. 1667, t. 29; Poth. Pers. 614, 623, C. O. t. 9, n. 18; Dom. l. 2, t. 1, s. 5, n. 1, 2; 1 Delv. 129; 4 P. Fr. 467, 607; C N. 471. [I. 337.]

311. Every settlement between a minor become of age and his tutor, relating to the administration and account of the latter, is null, unless it is preceded by a detailed account, and the delivery of vouchers in support thereof.—Poth. Pers. 622, C. O. t. 9, n. 18; 1 Arg. 68; Lam. t. 4, a. 129; 1 Mal. 420; 1 Gin, 340; C. N. 472. [I. 337.]

312. If the account give rise to contestations, they are proceeded with and adjudicated upon in the manner provided

in the Code of Civil Procedure. Poth. Pers. 624; O. 1667, t. 29. [I. 337.]

313. Any balance due by the tutor bears interest without demand, from the closing of the account. Interest on any sum due by the minor to the tutor, only runs from the time of his being put in default by the tutor, after the closing of the account.—Poth. Pers. 624, 5; Lam. t. 4, a. 127, 8; 1 Arg. 68; 1 Bous. 584; 1 Mal. 421; 1 Gin, 341, 2. [I. 337.]

CHAPTER THIRD.

OF EMANCIPATION.

314. Every minor is, of right, emancipated by marriage.—C. P. 239, 272; Lam. t. 2, a. 2. t. 4, a. 121; 1 Arg. 64; Mes. 210-2-6; Poth. Pers. 621, C. O. t. 9, n. 21; 4 P. Fr. 610; 1 Gin, 342--; C. N. 476. [I. 337.]

315. An unmarried minor may, at his own request, or that of his tutor, or of any one related or allied to him, be emancipated by any court, judge or prothonotary having jurisdiction to confer tutorship, on the advice of a family council called and consulted as in the case of tutorship.—34 Geo. 3, c. 6, s. 8; 12 V. c. 38, s. 8; C. S. L. C. c. 86, s. 1, c. 78, s. 23; 1 Arg. 64; Poth. Pers. 622, C. O. t. 9, n. 18; N. D. Emancipation, § 5, n. 4, p. 502; 4 P. Fr. 616; 1 Gin, 344; C. N. 478. [I. 337.]

316. If the emancipation be granted out of court, it is subject to revision, and may be annulled by the court to which the judge or prothonotary who pronounced it belongs. From this judgment an appeal lies.—C. S. L. C. c. 86, s. 1; c. 78, s. 23. [I. 339.]

317. Whether emancipation results from marriage or is granted judicially, a curator must be appointed to the emancipated minor.—5 N. D. 503. [I. 339.]

318. The account of the tutorship is rendered to an emancipated minor with the assistance of his curator.—Lam. t. 4, a. 124; Poth. Pers. 626; Mes. 290; 1 Gin, a. 346; 1 Mal. 420-8; 4 P. Fr. 616; C. N. 480 [I. 339.]

319. An emancipated minor may grant leases for terms not exceeding nine years; he may receive his revenues, give receipts therefor, and perform all acts of mere administration. [He is not relievable from these acts, except in cases where persons of age would be so.]—Poth. Pers. 622, C. O. t. 9, n. 21; Ser. 61, 2; 1 Mal. 428; 1 Gin, 346; 4 P. Fr. 618; C. N. 481. [I. 339.]

320. He can neither bring nor defend a real action without the assistance of his curator.—Poth. Pers. 602-3, 622, Ob. n. 877; Ser. Inst. 141, 2; Bout. Inst. 107; 1 Pi. 68; 1 Arg. 71, 2; 1 Mal. 428; 1 Gin, 347; 4 P. Fr. 618--; C. N. 482. [I. 339.]

321. An emancipated minor cannot borrow without the assistance of his curator. Loans of large amount, considering his means, when effected by deeds bearing hypothec, are null, although made with the

assistance of his curator, if they be not authorized by the judge or prothonotary, on the advice of a family council; with the exception of the cases provided for in article 1005. —ff. L. 27, § 2, de min.; Fer. Tutelles, 230,1; Mes. 390,1; Ser. Inst. 141; 2 Frem. Tutelles, n. 1066; 1 Mal. 430,1; 4 P. Fr. 618; 6 Lo. E. C. 350 --; C. S. L. C. c. 78, s. 23; C. N. 483. [I. 339.]

322. Moreover, he can neither sell nor alienate his immoveable property, nor perform any acts other than those of mere administration, without observing the formalities prescribed for unemancipated minors. With respect to any obligations which he may have contracted by purchase or otherwise, they may be reduced if excessive; the courts taking into consideration the fortune of the minor, the good or bad faith of the persons who have contracted with him, and the utility or inutility of the expenditure.—Cod. L. 3, de h. q. ven. æt.; Poth. Pers. 603, C. O. t. 9, a. 181, n. 5; 6 Lo. E. C. 354; 1 Mal. 430; 4 P. Fr. 619; C. N. 484. [I. 341.]

323. A minor engaged in trade is reputed of full age for all acts relating to such trade. —1 Desp. pt. 4, t. 11, s. 2, n. 22, & authors cited; 2 Hen. l. 4. q. 127; Lac. Restitution, s. 2, n. 10; O. 1673, t. 1, a. 6; 2 Bor. 448; 4 P. Fr. 622,3; 1 Mal. 431; 4 Ency. 571; C. N. 487. [I. 341.]

TITLE TENTH.

OF MAJORITY, INTERDICTION, CURATORSHIP AND JUDICIAL ADVISERS.

CHAPTER FIRST.

OF MAJORITY.

324. Majority is fixed at the complete age of twenty-one years. At that age persons are capable of performing all civil acts.—Poth. Pers. t. 5; C. S. L. C. c. 34, s. 1; C. N. 488. [I. 341.]

CHAPTER SECOND.

OF INTERDICTION.

325. A person of full age, or an emancipated minor, who is in an habitual state of imbecility, insanity or madness, must be interdicted, even though he has lucid intervals. —ff. De cur. fur.; Cod. L. 1, L. 6. de cur. fur.; Inst. de cur. § 3; Poth. Pers. 625; A. D. Interdiction; Merl. Interdit, § 3, 4, n. 1, 2, 6; C. N. 489. [I. 341.]

326. Persons who commit acts of prodigality, which give reason to fear that they will

dissipate the whole of their property, are also to be interdicted.—Poth. Pers. 625; Merl. Interdiction, § 1, 2, n. 1; 4 P. Fr. 636; 1 Mal. 434; 2 Toul. 1309; C. S. L. C. c. 78, s. 23. [I. 341.]

327. Every person has the right to demand the interdiction of any one related or allied to him, who is prodigal, mad, imbecile, or insane. Husband or wife, likewise, may demand the interdiction the one of the other.—Poth. Pers. 625; Merl. Interdiction, § 3, 4; Fer. D. Interdiction, 58; C. N. 490. [I. 341.]

328. The demand for interdiction must be made before the proper court, or before one of the judges or the prothonotary of such court; it must contain a specification of the acts of imbecility, insanity, madness or prodigality. The applicant is obliged to prove these acts.—34 Geo. 3, c. 6, s. 8; V. c. 44, s. 91; Poth. Pers. 625; Fer. D. l. c.; N. D. Curatelle, 710; 2 Toul. n. 1319; 1 Mal. 435; 1 Gin, 355; C. N. 492, 493; C. S. L. C. c. 78, s. 23. [I. 343.]

329. The court, judge or prothonotary before whom the demand is made, orders a family council to be called, as in the case of tutorship, and takes its advice as to the state of the person whose interdiction is sought; but he who makes the demand cannot form part of the family council.—Poth. Pers. t. 6, s. 5, a. 1; Den. A. N. 113; 1 Gin, 356; C. N. 494, 495; C. S. L. C. c. 78, s. 23. [I. 343.]

330. When the demand is made on account of imbecility, insanity or madness, the defendant must be interrogated by the judge, attended by a clerk or assistant, or by the prothonotary; the examination is taken down in writing, and communicated to the family council.—These interrogatories are not required if the interdiction be sought on account of prodigality; but in this case, the defendant must be heard or have been summoned to appear.—ff. L. 5, De cur. fur.; Den. 113; 1 Bourj. 77; Fer. D. Interdiction, 58-9; C. N. 496; C. S. L. C. c. 78, s. 23. [I. 343.]

331. If the demand for interdiction be rejected, the court may, if circumstances require it, appoint a judicial adviser to the defendant.—6 Merl. Conseil Judic. n. 1, p. 96; Fer. D. Interdiction, 58, 59; C. N. 499. [I. 343.]

332. If the interdiction be pronounced out of court, it is subject to revision by the court, on petition of the person interdicted or of any of his relations. The judgment of the court is also subject to appeal.—41 Geo. III. c. 7, s. 18. [I. 343.]

333. Every sentence or judgment of interdiction or for the appointment of an adviser is, at the instance of the applicant, notified to the defendant, and inscribed without delay by the prothonotary or clerk on the roll kept for that purpose, and publicly exposed in the office of each of the courts having power to interdict in the district.—Fer. D. Inter-

diction, 59; 1 Bour. 79; Den. A. N. 115; C. N. 501. [I. 345.]

334. Interdiction or the appointment of an adviser takes effect from the day of the judgment, notwithstanding the appeal.—All acts done subsequently by the person interdicted for imbecility, madness or insanity are null; the acts done by any one to whom an adviser has been given, without the assistance of such adviser are null, if injurious to him, in the same manner as those of minors and of persons interdicted for prodigality, according to article 987.—Fer. D. Interdiction, 58-9; Poth. Ob. n. 51, Don. s. 1, a. 1; Guy. Interdiction, 443, 450; C. N. 502. [I. 345.]

335. Acts anterior to interdiction for imbecility, insanity or madness may nevertheless be set aside, if the cause of such interdiction notoriously existed at the time when these acts were done.—1 Bour. 76, n. 8-11; 1 Ric. Don. pt. 1, c. 3, s. 3, n. 146; 2 Aug. 96, arr. 2 April, 1708; C. N. 503. [I. 345.]

336. Interdiction ceases with the causes which necessitated it. Nevertheless it cannot be removed without observing the formalities prescribed for obtaining it, and the interdicted person cannot resume the exercise of his rights until after the judgment removing the interdiction.—Poth. Pers. 625, 6; 1 Bour. 77, 8; N. D. Curatelle, 716; Guy. Interdiction, 450; C. N. 512. [I. 345.]

CHAPTER THIRD.

OF CURATORSHIP.

337. There are two sorts of curatorship, one to the person, the other to property.—Poth. Pers. 628; N. D. 716-7. [I. 345.]

338. The persons to whom curators are given are:

1. Emancipated minors;
2. Interdicted persons;
3. Children conceived but not yet born.—Poth. l. c. 5; N. D. 706; 1 Id. 64; Bret. Q. D. Absent, c. 111. [I. 345.]

339. Curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors. They are sworn before entering upon their duties.—N. D. l. c.; Poth. l. c. [I. 345.]

340. A curator to an emancipated minor has no control over his person; he is given in order to assist him in matters and proceedings in which he cannot act alone. This curatorship ends with the minority.—Poth. 626; 5 N. D. 701. [I. 345.]

341. A curator to an interdicted person is appointed by the judgment which pronounces the interdiction.—Fer. D. Interdiction, 58; 5 N. D. 708, § 5; Poth. 625. [I. 345.]

342. The husband, unless there are valid reasons to the contrary, must be appointed curator to his interdicted wife. The wife may be curatrix to her husband.—Guy. Interdiction, 442; 15 Merl. 403; Mes. 365; 1 Bourj. 77; 2 Pi. 83;

Den. A. N. 115; 4 P. Fr. 653. [I. 247.]

343. The curator to a person interdicted for imbecility, insanity or madness has over such person and his property all the powers of the tutor over the person and property of a minor; and he is bound towards him in the same manner as the tutor is towards his pupil.—These powers and obligations extend only to the property, when the interdiction is for prodigality.—Den. A. N. 115; Lam. t. 4, a. 137; Poth. 626; Id. Prop. n. 7, Suc. c. 3, s. 3, a. 1, § 3, C. O. t. 17, n. 40. [I. 437.]

344. [No one, with the exception of husband and wife, and ascendants and descendants, is obliged to retain the curatorship of an interdicted person for more than ten years; at the expiration of that time, the curator may demand and has a right to be replaced.—C. N. 508. [I. 347.]

345. The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.—Poth. Pers. 627; 5 N. D. 717; 2 Toul. 315; C. N. 393. [I. 347.]

346. If during the curatorship, the party subjected to it have any interests to discuss with his curator, such party is given, for that case, a curator *ad hoc*, whose powers only extend to the matters to be discussed.—5 N. D. 701. [I. 347.]

347. Curators to property are those appointed:

1. To the property of absentees;
2. In cases of substitution;
3. To vacant estates;
4. To the property of extinct corporations;
5. To property abandoned by arrested or imprisoned debtors or on account of hypothecs;
6. To property accepted under benefit of inventory.—5 N. D. 700; Poth. 628. [I. 347.]

348. The provisions relating to curators to the property of absentees are contained in the title *Of Absentees*. Those concerning curators to the property of extinct corporations, in the title *Of Corporations*. In the third book and in the Code of Civil Procedure are to be found the rules touching the appointment, powers and duties of the other curators mentioned in the preceding article, who must also be sworn. [I. 347.]

CHAPTER FOURTH.

OF JUDICIAL ADVISERS.

349. A judicial adviser is given to those who, without being absolutely insane or prodigal, are nevertheless of weak intellect, or so inclined to prodigality as to give reason to fear that they will dissipate their property or seriously impair their fortune.—Fer. D. Conseil, 397, Interdit, 58, 9; A. D. Conseil, 624; Guy. Interdiction, 436; C. N. 513, 514. [I. 347.]

350. Judicial advisers are

given by those who have power to interdict, on the demand of any person who has a right to demand interdiction, and with the same formalities. Such demand may also be made by the party himself.—Fer. D. Conseil, 397, Interdiction, 59, 60; A. D. Conseil, 625, n. 7; N. D. Conseil Jud. § 2, p. 254; C. N. 514. [I. 349.]

351. If the powers of the judicial adviser be not defined by the judgment, the person to whom he is appointed is prohibited from pleading, transacting, borrowing, receiving moveable capital and giving a discharge therefor, as also from alienating or hypothecating his property without the assistance of such adviser.—The prohibition can only be removed in the same manner that the appointment has been made.—Poth. Pers. 626; 1 Bour. 80; Fer. D. Conseil, 397; A. D. Conseil, 624-5; N. D. Conseil Jud. § 2, p. 254--; C. N. 513. [I. 349.]

TITLE ELEVENTH.

OF CORPORATIONS.

CHAPTER FIRST.

OF THE NATURE AND CREATION OF CORPORATIONS, AND OF THEIR DIFFERENT KINDS.

352. Every corporation legally constituted is an artificial or ideal person, whose existence and succession are perpetual, or sometimes for a fixed period only, and which is capable of enjoying certain rights and liable to certain obligations.—Poth. Pers. 628; N. D. Corps, 581; 3 Bla. 467. [I. 349.]

353. Corporations are constituted by act of parliament, by royal charter, or by prescription.—Those corporations also are reputed to be legally constituted which existed at the time of the cession of the country and which have been since continued and recognized by competent authority.—2 V. c. 26; C. S. L. C. c. 19. [I. 349.]

354. Corporations are aggregate or sole.—Corporations aggregate are those composed of several members; corporations sole are those consisting of a single individual.—1 Bla. 469; 1 Whar. L. L. 219; Grant, Corp. 6; 5 N. D. 581; 1 Lor. 485, 6. [I. 349.]

355. Corporations are either ecclesiastical or religious, or they are lay or secular.—Ecclesiastical corporations are aggregate or sole. They are all public.—Secular corporations are either aggregate or sole. They are either public or private.—Grant, 9; 1 Bla. 470; 1 Whar. L. L. 219; Dun.

pt. 2, p. 8; Poth. Pres. 142, 191; 2 V. c. 26; 19 & 20 V. c. 103. [I. 349.]

356. Secular corporations are further divided into political and civil; those that are political are governed by the public law, and only fall within the control of the civil law in their relations, in certain respects, to individual members of society.—Civil corporations constituting, by the fact of their incorporation, ideal or artificial persons, are as such governed by the laws affecting individuals; saving the privileges they enjoy and the disabilities they are subjected to. —1 Bla. 41 --; 1 P. Fr. 365; 1 Dur. 17; 1 Marc. 19. [I. 349.]

CHAPTER SECOND.

OF THE RIGHTS, PRIVILEGES, AND DISABILITIES OF CORPORATIONS.

SECTION I.

Of the rights of corporations.

357. Every corporation has a corporate name, which is given to it at its creation or which has since been recognized and approved by competent authority.—Under such name the corporation is known and designated, sues and is sued, and does all its acts and exercises all the rights which belong to it.—3 Bla. 475; Arn. Corp. 8; C. L. 423. [I. 351.]

358. The rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obligations, and bind others in its favor.—Poth. Pers. 628; 5 N. D. 597; 3 Bla. 475, 6; 1 Fer. D. 441; 2 V. c. 26; Ind. to Stat. Wicksteed, 126; C. L. 424. [I. 351.]

359. For these objects, every corporation has the right to select from its members, officers whose number and denominations are determined by the instrument of its creation or by its by-laws or regulations.— Poth. Pers 629; Fer. D. l. c.; 3 Dom. t. 15, s. 2, n. 9; C. S. C. c. 5, s. 6, § 24. [I. 351.]

360. These officers represent the corporation in all acts contracts or suits, and bind it in all matters which do not exceed the limits of the powers conferred on them. These powers are either determined by law, by the by-laws of the corporation, or by the nature of the duties imposed.—Poth. l. c.; Fer. D. l.c.; C. L. 430. [I. 351.]

361. Every corporation has a right to make, for its internal government, for the order of its proceedings and for the management of its affairs, by-laws and regulations which its members are bound to obey, provided they are legally and regularly passed.—Poth. l. c.; 5 N. D. 594; 3 Bla. 476; C. S. C. c. 5, s. 6, § 24; C. L. 430. [I. 351.]

SECTION II.

Of the privileges of corporations.

362. Besides the special privileges which may be granted to each corporation by its title of creation or by special law, there are others which result from the fact of incorporation and which exist of right in favor of all corporate bodies, unless taken away, restrained or modified by such title or by law.—3 Bla. 475; C. S. C. l. c. [I. 351.]

363. The principal of these privileges is that which limits the responsibility of the members of a corporation to the interest which each possesses therein, and exempts them from all personal liability for the payment of obligations contracted by the corporation within the scope of its powers and with the formalities required.—Poth. Pers. 628,9; Fer. D. l. c.; 5 N. D. 597; 3 Bla. 468; C. S. C. l. c. [I. 353.]

SECTION III.

Of the disabilities of corporations.

364. Corporations are subject to particular disabilities which either prevent or restrain them from exercising certain rights, powers, privileges and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character or they are imposed by law.—3 Bla. 475; Poth. Pers. 630; Fer. D. 441; N. D. 597. [I. 353.]

365. In consequence of the disabilities which arise from their corporate character, they can neither be tutors nor curators, saving the exception contained in chapter 34 of the Consolidated Statutes for Lower Canada, nor can they take part in meetings of family councils.—They cannot be entrusted with the execution of wills or any other administration which necessitates the taking of an oath, or imposes personal responsibility.—They cannot be summoned personally, nor appear in court otherwise than by attorney.—They cannot sue nor be sued for assault, battery or other violence on the person.—They cannot serve as witnesses nor as jurors before the courts.—They can neither be guardians nor judicial sequestrators, nor can they be charged with any other functions or duties the exercise of which may entail imprisonment.—Poth. Pers. 628,-9; 3 Bla. 476; Fer. D. 441; 5 N. D. 597. [I. 353.]

366. The disabilities arising from the law are:

1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs;

2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property or property so reputed, without the permission of the crown, except for certain purposes only, and to a fixed amount and value;

3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain or belonging to corporate bodies, particular formalities, not required by the common law.—Poth. Pers. 630; Fer. D. l. c.; 5 N. D. 597. [I. 353; III. 375.]

367. All corporations are prohibited from carrying on the business of banking unless they have been specially authorized to do so by their title of creation.—C. S. C. c. 5, s. 6, § 24.—[I. 353.]

CHAPTER THIRD.

OF THE DISSOLUTION OF CORPORATIONS AND THE LIQUIDATION OF THEIR AFFAIRS.

SECTION I.

Of the dissolution of corporations.

368. Corporations are dissolved:

1. By any act of the legislature declaring their dissolution;

2. By the expiration of the term or the accomplishment of the object for which they were formed, or the happening of the condition attached to their creation;

3. By forfeiture legally incurred;

4. By the natural death of all the members, the diminution of their number, or by any other cause of a nature to interrupt the corporate existence, when the right of succession is not provided for in such cases;

5. By the mutual consent of all the members, subject to the modifications and under the circumstances hereinafter determined.—1 Bla. 484; C. S. L. C. c. 88, s. 10. [I. 355.]

369. Ecclesiastical and secular corporations of a public nature, other than those formed for the mutual assistance of their members, cannot be dissolved by mutual consent without a formal and legal surrender or the authority of the legislature, as the case may be.—The same rule applies to banks, to railway, canal, telegraph, toll-bridge, and turnpike companies, and generally to private corporations who have obtained privileges which are exclusive or exceed those resulting by law from incorporation.—C. 13; L. 38, ff. de pact.; L. 45, de reg. jur.; Cod. L. 6, de pact. [I. 355.]

370. Public corporations formed for the mutual assistance of their members, and those of a private nature not included in the preceding article, may be dissolved by mutual consent, on conforming to the conditions which may have been specially imposed on them, and saving the rights of third parties.—*Rule that private rights may be waived;* L. 7, § 7, ff. de pact.; Cod. L. 29, e. t. [I. 355.]

SECTION II.

Of the liquidation of the affairs of dissolved corporations.

371. A dissolved corporation is, for the liquidation of

its affairs, in the same position as a vacant succession. The creditors and others interested have the same recourse against the property which belonged to it, as may be exercised against vacant successions and the property belonging to them.—[I. 355.]

372. In order to facilitate such recourse, a curator, who represents such corporation and is seized of the property which belonged to it, is appointed by the proper court, with the formalities observed in the case of vacant estates.—C. S. L. C. c. 88, s. 10. [I. 355.]

373. Such curator must be sworn; he must give security and make an inventory. He must also dispose of the moveables, and must proceed to the sale of the immoveable property, and to the distribution of the price between the creditors and others entitled to it, in the manner prescribed for the discussion, distribution and division of the property of vacant estates to which a curator has been appointed, and in the cases and with the formalities required by the Code of Civil Procedure.—C. S. L. C. c. 88, s. 10. [I. 357.]

BOOK SECOND.

OF PROPERTY, OF OWNERSHIP AND OF ITS DIFFERENT MODIFICATIONS.

TITLE FIRST.

OF THE DISTINCTION OF THINGS.

374. All property, incorporeal as well as corporeal, is moveable or immoveable.—C. P. 88; 2 P. Poul. 55; Arr. Lam. pt. 2, t. 8, a. 1; Poth. Com. 27, 66; Id. Intr. 45; 3 Toul. 4, 5; 5 P. Fr. 35; C. N. 516. [I. 445.]

CHAPTER FIRST.

OF IMMOVEABLES.

375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.—C. N. 517; C. L. 454; Poth. Intr. 49, Choses, 638, 642; Lam. t. 8, a. 1, p. 46; 2 Boi. 595; 2 Mal. 5, 6; 2 Marc. n. 340, p. 327-8, n. 371, p. 364; 9 Demol. 40, 41, n. 93, & p. 248, 9, n. 378--; 2 Boi. 619, on a. 526. [I. 445.]

376. Lands and buildings

are immoveable by their nature. Poth. Choses, 638; Id. Intr. n. 47; Lam. t. 8, a. 1, p. 47; 3 Toul. 8; 2 P. Poul. 63; Inst. De rer. div. l. 2, t. 1, § 30; C. N. 518; C. L. 455. [I. 445.]

377. Windmills and watermills, built on piles and forming part of the building, are also immoveable by their nature when they are constructed for a permanency.—C. P. 90; Poth. Com. n. 36, 37; Id. Choses, 638-9; Id. Intr. n. 47; 2 Boi. 600, on a. 519; 2 Marc. 328-9; C. N. 519. [I. 445.]

378. Crops uncut and fruits unplucked are also immoveable.—According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees; they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled.—C. P. 92; ff. L. 44, De rei. vind.; L. 25, § 6, Quæ in frau. cred.; Lam. t. 8, a. 19; Poth. Com. n. 45; Id. Choses, 640; 3 Toul. 8; 5 P. Fr. 40 --; C. N. 520. [I. 445.]

379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there.—Thus, within these restrictions, the following and other like objects are immoveable:

1. Presses, boilers, stills, vats and tuns;

2. All utensils necessary for working forges, paper-mills and other manufactories.—Manure, and the straw and other substances intended for manure, are likewise immoveable by destination.—ff. L. 15, De act. emp.; 1 Bour. 143; 3 Toul.12,11; C. N. 523;—on § 1: C. P. 90; Poth. Com. 47 --; Id. Choses, 641; 5 P. Fr. 68-9; 2 P. Poul. p. 66, n. 10, 11; D. on a. 524, p. 112; Fen. Poth. on a. 524, p. 123; C. N. 524;—on § 3: 2 P. Poul. 65, 66, n. 8, 9; C. P. 90; Poth. Com. n. 50-52; Id. Choses, 638 --;—on § 4: Poth. Com. n. 47 --; Id. Choses, l. c.; 2 P. Poul. 66, n. 10 --; 5 P. Fr. 66, 7; 2 Mal. 10;—on § 5: Poth. Com. n. 40; Id. Choses, 639; ff. L. 17, De act. emp. [I. 447.]

380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.—Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.—C. P. 90; Poth. Com. 47 --; Id. Choses, 641; Lam. t. 8, a. 6; 2 P. Poul. 66, n. 10; C. N. 525. [I. 447.]

381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, servitudes, and rights or actions which tend to obtain possession of an immoveable, are immove-

able by reason of the objects to which they are attached.—Poth. Com. 67; 2 Boi. 611 --; 2 Marc. 342 --; 9 Demol. n. 529 --, n. 490 --; 2 Zach. 20; 1 Dem. 298; 2 Fur. Don. q. 31, n. 17; Poth. Intr. n. 51; 1 Arg. 109; C. N. 526. [I. 447.]

382. All moveable property, of which the law ordains or authorizes the realization, becomes immoveable by determination of law, either absolutely or for certain purposes. —The law declares to be immoveable the capital of unredeemed constituted rents that were created before the promulgation of this code, as also all moneys produced by the redemption during their minority of constituted rents belonging to minors.—The same rule applies to all sums accruing to a minor from the sale of his immoveables during his minority, which sums remain immoveable so long as the minority lasts.—The law declares to be immoveable all sums given by ascendants to their children, in contemplation of marriage, to be used in the purchase of real estate or to remain as private property to them only or to them and to their children. —C. P. 93, 94; 1 Lau. 241-246; 1 Arg. 102 --; 2 P. Poul. 63 --; Poth. Choses, 646; Intr. n. 55; Mes. 510; 5 P. Fr. 75, 6; 2 Marc. 364; 9 Demol. 248. [I. 447.]

CHAPTER SECOND.

OF MOVEABLES.

383. Property is moveable by its nature or by determination of law.—Poth. Intr. 45, 46; Id. Com. 28, 29; Id. Choses 638; 1 Arg. 98; 9 Demol. n. 338 --; 2 Marc. n. 373, p. 364; C. N. 527. [I. 447.]

384. All bodies which can be moved from one place to another, either by themselves, as animals, or by extrinsic force, as inanimate things, are moveable by nature.—ff. L. 93, De verb. sig.; Poth. Com. n. 28-30, 34, 39; Id. Choses, 638; Id. Intr. n. 46; 3 Toul. 13, 14; 9 Demol. n. 394-5; C. N. 528. [I. 449.]

385. Boats, scows, ships, floating mills and floating baths and generally all manufactories not built on piles and not forming part of the realty, are moveable.—Poth. Com. 29, 36; Id. Intr. 46; Id. Choses, 638; 1. Lam. t. 8, a. 13, 14; O. Mar. l. 2, t. 10, a. 1; C. N. 531. [I. 449.]

386. Materials arising from the demolition of a building, or of a wall or other fence, and those collected for the construction of a new one, are moveable so long as they are not used.—But things forming part of a building, wall or fence, and which are only temporarily separated from it, do not cease to be immoveable so long as they are destined to be placed back again.—Poth. Com. 39, 62, 195; Id. Intr. 48; Id. Choses, 642; 5 P. Fr. 88; C. N. 532. [I. 449.]

387. Those immoveables are moveable by determination of law, of which the law for certain purposes authorizes the mobilization, so are all obligations and actions respecting

moveable effects, including debts created or guaranteed by the province or by corporations, also all shares or interests in financial, commercial or manufacturing companies, although, such companies, for the purposes of their business, should own immoveables. These immoveables are reputed to be moveable with regard to each partner, only so long as the company lasts.—1 Lau. 225 --; Lam. t. 8, a. 1, 2; Poth. Com. 69; Id. Intr. 50, 52, 56; Id. Choses, 644 --; C. P. 89; C. N. 529. [I. 449.]

388. [Constituted rents and all other perpetual or life rents, are also moveable by determination of law; saving those resulting from emphyteusis, which are immoveable.] —9 Demol. 286-7; 2 Mar. 347; Poth. Intr. n. 55; C. N. 529. [I. 449.]

389. No ground-rent, or other rent, affecting real estate, can be created for a term exceeding ninety-nine years, or the lives of three persons consecutively.—These terms having expired, the creditor of any such rent may exact the capital of it.—Such rents although created for ninety-nine years, or for the lives of three persons, are, at all times, redeemable, at the option of the debtor, in the same manner as constituted rents to which they are assimilated.—C. S. L. C. c. 50, s. 1, p. 484 --; C. N. 530. [I. 449.]

390. It is nevertheless competent for the parties to stipulate, in the title creating these rents, that they shall only be redeemed at a certain time agreed upon, which cannot exceed thirty years; every stipulation extending this term being null with regard to the excess.—Ib. s. 2; C. N. 530. [I. 449.]

391. All ground-rents, or other rents, affecting real estate, created heretofore, for a term exceeding ninety-nine years or the lives of three persons, are redeemable at the option of the debtor or of the possessor of the immoveable charged.—C. N. 530. [I. 451.]

392. Rents created by emphyteutic lease are not however subject to such redemption, nor those to which the creditor has only a conditional or a limited right.—Ib. s. 3. [I. 451.]

393. [Where the sum for which the redemption of rents, other than life-rents, may take place is neither fixed by law nor validly agreed upon, the rents are redeemed by the repayment of the original price in capital, or of the value in money put by the parties upon the things which formed the consideration of the rents so created. If such price or such value do not appear, the redemption is effected by the payment of a sum sufficient to produce a like rent for the future, at the legal rate of interest at the time of the redemption.]—Special provisions concerning the redemption of the rents substituted for seigniorial rights, are contained in chapter forty-one of the Consolidated Statutes for Lower Canada.—C. N. 530. [I. 451; III. 375.]

394. [Life-rents and other temporary rents, at the termination of which no reimbursement of the capital is to take place, are not redeemable at the option of either of the parties alone.—In the twelfth title of the third book, a mode is provided for the redemption of life-rents, when it takes place forcibly under judicial proceedings.—Temporary rents, other than life-rents, and not subject to reimbursement of the capital, are estimated, in like case, in the same manner as life-rents.] [III. 375.]

395. The word "moveables" employed alone in any law or act, does not comprise money, precious stones, debts due, books, medals, scientific, artistic or mechanical instruments, body-linen, horses, carriages, arms, grain, wines, hay and other provisions, nor stock in trade.—ff. De supel. leg.; 1 Bour. l. 1, c. 4, s. 1, p. 140; Poth. Test. c. 7, a. 4, s. 2; Fen. Poth. on a. 533; 5 P. Fr. 89; 7 Lo. E. C. 79; C. N. 533. [I. 451.]

396. The word "furniture" comprises only the moveables which are destined to furnish and ornament apartments, such as tapestry, beds, seats, mirrors, clocks, tables, china and other objects of a like kind.—It also comprises pictures and statues, but not collections of pictures which are in galleries or particular rooms.—As regards china, likewise, only that which forms part of the decoration of a room comes under the denomination of furniture.—1 Bour. l. 1, c. 4, s. 2, p. 140; Fen. Poth. 131; 5 P. Fr. 92-3; Poth. Test. c. 7, a. 4, § 2, 9; Merl. Biens, § 1, n. 15; 3 Toul. 18; C. N. 534. [I. 451.]

397. The expressions "moveable property," and "moveable things" comprise generally whatever is reputed moveable according to the rules above established.—In the sale or the gift of a "furnished house" the word "furnished" comprises no other moveables than furniture.—Poth. Test. c. 7, a. 4, s. 2, 3, 4; 1 Bour. l. 1, c. 4, s. 3; 5 P. Fr. 95; 3 Toul. 18; C. N. 535. [I. 451.]

398. The sale or gift of a house with all that it contains, does not comprise ready money, nor debts due or other rights the titles to which happen to be in the house. It comprises all other moveable effects.—Poth. Test. c. 7, a. 4, § 5; 5 Toul. 504; 5 P. Fr. 95, 96; C. N. 536. [I. 451.]

CHAPTER THIRD.

OF PROPERTY IN ITS RELATIONS WITH THOSE TO WHOM IT BELONGS OR WHO POSSESS IT.

399. Property belongs either to the crown, or to municipalities or other corporations, or to individuals.—That of the first kind is governed by public or administrative law.—That of the second is subject, in certain respects as to its administration, its acquisition and its alienation, to certain rules and formalities which are peculiar to it.—As to individuals, they have the free disposal of the things belonging to them, under the modifica-

tions established by law.—Cod. L. 21, Mand.; Poth. Prop. n. 6, 7; 3 Toul. 23 --; 9 Demol. 330 --; 3 Ency. 135, n. 116; 2 Marc. 380, n. 393; 5 P. Fr. 96 --; 7 Lo. E. C. 86; C. N. 537; Poth. Intr. n. 101; Id. Pers. pt. 1, t. 7, a. 1, p. 637. [I. 453.]

400. Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbors and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the crown domain.—Boutil. S. R. l. 1, t. 72, 73, 85; Loi. l. 2, t. 2, a. 5; Lebret, S. l. 2, c. 15; Loy. Seign. c. 12, n. 120; Chit. Pr. 142, 206, 207; 2 Bla. 261, 262, *n.* 6; 3 Toul. n. 30, 31, p. 24; 3 Ency. 136; C. N. 538; C. S. L. C. c. 24. [I. 453.]

401. All estates which are vacant or without an owner, and those of persons who die without representatives or whose succession is abandoned, belong to the crown.—C. P. 167; Cod. de bon. vac.; Ib. L. 2, De pet. bon.; 3 Toul. 25; 5 P. Fr. 109; 7 Lo. 99; D. 117, *n.* (*a*); C. N. 539. [I. 453.]

402. The gates, walls, ditches and ramparts of military places and of fortresses also belong to the crown.—Ib.; C. N. 540. [I. 453.]

403. The same rule applies to the lands, fortifications and ramparts of places which are no longer used for military purposes; they belong to the crown, if they have not been validly alienated.—Ed. Dec. 1681; 3 Toul. p. 25, 28, 348; 2 Marc. 382; 3 Ency. 136; 7 Lo. 96, 97; 5 P. Fr. 110, 11; C. N. 541. [I. 453.]

404. The property of municipalities and other corporations is that to which or to the use of which these bodies have an acquired right.—ff. L. 6, De div. rer.; 3 Toul. n. 44, 45, 47-62; C. N. 542; 3 Ency. 137; 5 P. Fr. 111. [I. 453.]

405. A person may have on property either a right of ownership, or a simple right of enjoyment, or a servitude to exercise.—3 Toul. 245; 2 Marc. 384; 3 Ency. 138; C. N. 543. [I. 453.]

TITLE SECOND.

OF OWNERSHIP.

406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations.—Cod. L. 21, Mand; Poth. Prop. n. 4, 13, 14; Id. B. R. n.

42, 112; Intr. n. 100, 101. C. N. 544; 5 P. Fr. 180; 2 Marc. 395. [I. 455.]

407. No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.—Poth. Vente, n. 510-514; Id. Prop. 274; 5 P. Fr. 183; C. N. 545. [I. 455.]

408. Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory whether naturally or artificially. This right is called the right of accession.—ff. L. 6, De adq. rer. dom, L. 5, De rei. vind.; Poth. Prop. 5, 150, 151, 260; Id. Intr. 100; C. N. 546. [I. 455.]

CHAPTER FIRST.

OF THE RIGHT OF ACCESSION OVER WHAT IS PRODUCED BY A THING.

409. The natural and industrial fruits of the earth, civil fruits, and the increase of animals belong to the proprietor by right of accession.—ff. L. 6, L 9, De adq. rer. dom.; L. 5, De rei. vind.; Poth. Prop. 151-154; 5 P. Fr. 161, 184; 3 Toul. 71; C. N. 547. [I. 455.]

410. The fruits produced by a thing, only belong to the proprietor subject to the obligation of restoring the cost of the ploughing, tilling and sowing done by third persons.—ff. L. 9, de adq. rer. dom.; L. 5, de rei vind.; Poth. Prop. 151; 5 P. Fr. 185; C. N. 548. [I. 455.]

411. A mere possessor only acquires the fruits in the case of his possession being in good faith; otherwise he is obliged to give the produce as well as the thing itself to the proprietor who claims it.—A possessor in good faith is not bound to set off the fruits against improvements for which he has a right to be reimbursed.—ff. L. 25, de usu. et fruc.; Cod. L. 12, de rei vind.; Poth. Pos. 82, 83; Id. Pres. 78; Id. Prop. 155, 281, 332-336, 341 --; Id. Intr. 107; Id. Vente, 326; C. N. 549. [I. 455; III. 375.]

412. A possessor is in good faith when he possesses in virtue of a title the defects of which as well as the happening of the resolutory cause which puts an end to it are unknown to him. Such good faith ceases only from the moment that these defects or the resolutory cause are made known to him by proceedings at law.—ff. L. 109, de verb. sig.; Ser. Inst. 88; 2 Arg. 501; Poth. Pos. n. 82, p. 550, Prop. l. c. n. 335, 341, 342; 1 Fur. 328; 2 Marc. n. 550 --; 9 Demol. 586 --; 3 Toul. 49; 2 Mal. 28 --; 1 Dem. n. 553; 1 Dur. n. 584; D. 120. *n.* (a); 3 Ency. Bonne foi, 236; C. N. 550. [I. 455; III. 375.]

CHAPTER SECOND.

OF THE RIGHT OF ACCESSION OVER WHAT BECOMES UNITED AND INCORPORATED WITH A THING.

413. Whatever becomes united to or incorporated with

a thing belongs to the proprietor, according to the rules hereinafter established.—Inst. l. 2, t. 1, § 29; ff. L. 23, §, penul. De rei vind.; Poth. Prop. 156; 3 Toul. 73; 9 Demol. n. 640 --; C. N. 551. [I. 457.]

SECTION I.

Of the right of accession in relation to immoveable property.

414. Ownership of the soil carries with it ownership of what is above and what is below it.—The proprietor may make upon the soil any plantations or buildings he thinks proper, saving the exceptions established in the title *Of Real Servitudes*.—He may make below it any buildings or excavations he thinks proper, and draw from such excavations any products they may yield, saving the modifications resulting from the laws and regulations relating to mines, and the laws and regulations of police.—ff. L. 24, de serv. praed. urb.; L. 21, § 2, quod vi aut clam; Cod. L. 8, L. 9, de serv. et aq.; C. P. 187; Poth. Com. 32; Lam. p. 2, t. 20, a. 13; Merl. Cave, Voisinage, § 5; 4 Dur. n. 370; 2 Mal. 31, 2; C. N. 552. [I. 457.]

415. All buildings, plantations and works on any land or underground, are presumed to have been made by the proprietor at his own cost, and to belong to him, unless the contrary is proved; without prejudice to any right of property, either in a cellar under the building of another or in any other part of such building, which a third party may have acquired or may acquire by prescription.—ff. Arg. ex. L. 7, § 10, De adq. rer. dom.; Poth. Prop. 177; 1 Delv. 181, *n.* 4; 4 Dur. n. 372; 2 Marc. 406, 7; C. N. 553. [I. 457.]

416. The proprietor of the soil who has constructed buildings or works with materials which do not belong to him, must pay the value thereof; he may also be condemned to pay damages, if there be any, but the proprietor of the materials has no right to take them away.—ff. L. 23, § 7, De rei vind.; Ib. L. 1, L. 2, de tig. junc.; Poth. Prop. 170-172, 178; 2 Mal. 32; 5 P. Fr. 202, 3; 3 Toul. 82; 2 Marc. n. 424; 9 Demol. 606; 1 Dem. n. 558 --; C. N. 554. [I. 457.]

417. When improvements have been made by a possessor with his own materials, the right of the proprietor to such improvements depends on their nature and the good or bad faith of such possessor.—If they were necessary, the proprietor of the land cannot have them taken away; he must, in all cases, pay what they cost, even when they no longer exist; saving, in the case of bad faith, the compensation of rents, issues and profits.—If they were not necessary, and were made by a possessor in good faith, the proprietor is obliged to keep them, if they still exist, and to pay either the amount they cost or that to the extent of which the value of the land has been augmented.—If, on the contrary, the possessor were

in bad faith, the proprietor has the option either of keeping them, upon paying what they cost or their actual value, or of permitting such possessor, if the latter can do so with advantage to himself and without deteriorating the land, to remove them at his own expense; otherwise, in each case, the improvements belong to the owner, without indemnification; the owner may, in every case, compel the possessor in bad faith to remove them.—Author. under a. 419. [I. 457.]

418. In the case of the third paragraph of the preceding article, if the improvements made by the possessor be so extensive and costly that the owner of the land cannot pay for them, he may, according to the circumstances and to the discretion of the court, compel the possessor to keep the property, and to pay the estimated value of it.—Author. under a. 419. [I. 457.]

419. In case the party in possession is forced to give up the immoveable upon which he has made improvements for which he is entitled to be reimbursed, he has a right to retain the property until such reimbursment is made, without prejudice to his personal recourse to obtain repayment; saving the case of surrender in any hypothecary action, which is specially provided for in the title *Of Privileges and Hypothecs.*—1 Merl. Améliorations, 367; Lac. Impenses, 342 --; Poth. Prop. 170-2, 346, 7; 5 P. Fr. 204; 2 Mal. 34 --; 3 Toul. 83; Lah. 54; Fen. Poth. 138, 9; Lawrence & Stuart, 6, L. C. R. 294; O. 1667, t. 27, a. 9; 2 Marc. on a. 555; C. N. 555. [I. 457; III. 377.]

420. Deposits of earth and augmentations which are gradually and imperceptibly formed on land contiguous to a stream or river are called alluvion.—Whether the stream or river is or is not navigable or floatable, the alluvion which is produced becomes the property of the owner of the adjacent land, subject in the former case, to the obligation of leaving a foot-road or tow-path.—2 Mal. 35, 6; O. E. F. 1669, t. 28, a. 7; 2 E. & O. 24; 7 Lo. E. C. 165 --; C. N. 556; Inst. l. 2, t. 1, § 20; May. l. 10, c. 3; Dup. l. 2, q. 3; Dum. § 1, gl. 5, n. 115; Bac. D. J. c. 30, n. 8; 2 Bous. 56, 7; Lac. Alluvion, 34. [I. 459.]

421. As to ground left dry by running water which insensibly withdraws from one of its banks by bearing in upon the other, the proprietor of the uncovered bank gains such ground, and the proprietor of the opposite bank cannot reclaim the land he has lost.—This right does not exist as regards land reclaimed from the sea, which forms part of the public domain.—ff. L. 7, § 1, De adq. rer.; O. 1681, l. 4, t. 7; Lebret, l. 2, c. 14; Poth. Prop. n. 159; 5 P. Fr. 211; 2 Mal. 37; 3 Toul. 105; 2 Bla. 262; Com. D. Prerog. D. 61; Chit. Pr. 207, 8; 2 Bous. 58; 2 Marc. 417; C. N. 557. [I. 459.]

422. Alluvion does not take place on the borders of lakes and ponds which are private

property; neither the proprietor of the lake nor the proprietor of the adjacent land gains or loses in consequence of the waters happening to rise or fall above or below their ordinary level.—ff. L. 7, § 6, L. 12. De adq. rer.; 2 Bous. 59; 5 P. Fr. 213; 4 Proud. D. P. 577 --; Lac. Alluvion, n. 3, p. 34; C. N. 558. [I. 459.]

423. If a river or stream, whether navigable or not, carry away by a sudden force a considerable and distinguishable part of an adjacent field and bear it towards a lower or opposite bank, the proprietor of the part carried away may reclaim it; [but he is obliged, on pain of forfeiting his right, to do so within a year, to be reckoned from the possession taken of it by the proprietor of the land to which it has been united.]—ff. L. 7, § 2, De adq. rer.; A. D. Alluvion, n. 4, p. 94; Lac. Alluvion, n. 2, p. 34; Poth. Prop. n. 158, 165; 1 N. D. Alluvion, n. 2, p. 465-7; C. N. 559. [I. 459.]

424. Islands, islets and deposits of earth formed in the beds of navigable or floatable rivers and streams belong to the crown, if there be no title to the contrary.—Poth. Prop. n. 160-163; Loi. I. C. l. 2, t. 2, a. 12; Bac. D. J. c. 30, n. 2, 5, 6; Bout. Inst. l. 2, t. 1, § 22; C. N. 560. [I. 459.]

425. Islands and deposits of earth, which are formed in rivers which are not navigable or floatable belong to the proprietors of the banks on the side where the island is formed. If the island be not formed on one side only, it belongs to the proprietors of the banks on both sides, divided by a line supposed to be drawn in the middle of the river.—ff. L. 29 De adq. rer.; Inst. § 22 de adq. rer.; Poth. Prop. n. 164; Lac. Isle, Islot, n. 1, p. 373; C. N. 561. [I. 461.]

426. If a river or stream, by forming a new branch, cut and surround the field of a proprietor contiguous to it, and thereby form an island, the proprietor retains the property of his field, although the island be formed in a navigable or floatable river or stream.—ff. L. 7, § 4, De adq. rer.; Inst. § 22; De div. rer.; Poth. Prop. n. 162; A. D. Alluvion, n. 4; 2 Marc. 421; 5 P. Fr. 137-8; C. N. 562. [I. 461.]

427. If a navigable or floatable river or stream abandon its course to take a new one, the former bed belongs to the crown. If the river be not navigable or floatable, the proprietors of the land newly occupied take as an indemnity the ancient bed, each in proportion to the land which has been taken from him.—Poth. Prop. n. 161-4; 2 Hen. l. 3, q. 30; Ser. Inst. l. 2, t. 1, § 23; 2 Bous. 65; C. N. 563. [I. 461.]

428. Pigeons, rabbits and fish which go into another dove-cot, warren or pond, become the property of him to whom such pond, warren or dove-cot belongs, provided they have not been attracted there by fraud or artifice.—ff. L. 3, § 2 De adq. rer.; Poth. Prop. 166-8, 278-9; Inst. l. 2, t. 1, § 14-16; Lap. let. Q. n. 29;

2 Bous. 66; 2 Mal. 43; Merl. Colombier; 10 Demol. 150; 5 P. Fr. 216-7; 7 Lo. E. C. 189, 190; C. N. 564. [I. 461.]

SECTION II.

Of the right of accession in relation to moveable property.

429. The right of accession, when it has for its object two moveable things, belonging to two different owners, is entirely subordinate to the principles of natural equity.—The following rules which are obligatory in the cases where they apply, serve as examples in the cases not provided for, according to circumstances.—Inst. l. 2, t. 1, § 27; 2 Bous. 67 on a. 565; 5 P. Fr. 128 --, 217; 2 Marc. 425-6; 3 Toul. 73; 2 Mal. 43-4; C. N. 565. [I. 461.]

430. When two things belonging to different owners have been united so as to form a whole, although they are separable and one can subsist without the other, the whole belongs to the owner of the thing which forms the principal part, subject to the obligation of paying the value of the other thing, to him to whom it belonged.—ff. L. 26, § 1. De adq. rer.; Poth. Prop. n. 169, 170, 179, 180; Ency. Accession, 104; 4 Dur. n. 435; 7 Lo. 193; 3 Toul. 74; C. N. 566. [I. 461.]

431. That part is reputed to be the principal one to which the other has been united only for the use, ornament or completion of the former.—ff. L. 26, § 1, De adq. rer.; Poth. Prop. n. 173, 4; 2 Marc. 426, 7; 3 Toul. 74; 5 P. Fr. 218; Ency. Accession, 103 --; 4 Dur. n. 436 --; C. N. 567. [I. 463.]

432. However, when the thing united is much more valuable than the principal thing, and has been employed without the knowledge of its owner, he may require that the thing so united be separated in order to be returned to him, although the thing to which it has been joined may thereby suffer some injury.—ff. L. 9, § 2, De adq. rer.; Inst. l. 2, § 1, 25; De div. rer.; Poth. Prop. n. 177 & 179; Ency. Accession, 104, 5; 4 Dur. n. 439; 5 P. Fr. 218, 9; C. N. 568. [I. 463.]

433. If of two things united so as to form a whole, one cannot be considered as the accessory of the other, the more valuable, or, if the values be nearly equal, the more considerable in bulk, is deemed to be the principal.—Poth. Prop. n. 174; ff. L. 27, § 2. De adq. rer.; 3 Toul. 75; 5 P. Fr. 219; 4 Dur. n. 440; 1 Ency. p. 104; 1 Dem. n. 573; C. N. 569. [I. 463.]

434. If an artisan or any other person have made use of any material which did not belong to him to form a thing of a new description, whether the material can resume its previous form or not, he who was the owner of it has a right to demand the thing so formed, on paying the price of the workmanship.—ff. L. 7, § 7; L. 26, § 1, 3. De adq. rer.; Poth. Prop. n. 186-8, 191; 3 Toul.

76; 5 P. Fr. 219, 220; C. N. 570. [I. 463.]

435. If however the workmanship be so important that it greatly exceeds the value of the material employed, it is then considered as the principal part, and the workman has a right to retain the thing, on paying the price of the material to the proprietor.—ff. L. 9, § 1, 2, De adq. rer.; Poth. Prop. n. 173; 1 Ency. p. 104, 5; 5 P. Fr. 220, 1; C. N. 571. [I. 463.]

436. When a person has made use of materials which in part belonged to him and in part did not, to make a thing of a different kind, without either of the two materials being entirely destroyed, but in such a way that they cannot be separated without inconvenience, the thing is common to the two proprietors, in proportion, as respects the one, to the material belonging to him, and as respects the other, to the material belonging to him and to the price of the workmanship.—ff. L. 7, § 8, 9, L. 12, § 1, De adq. rer.; Poth. Prop. n. 187; 3 Toul. 77; 5 P. Fr. 157, n. 31 -- & p. 221; C. N. 572. [I. 463.]

437. When a thing has been formed by the admixture of several materials belonging to different proprietors, but of which neither can be looked upon as the principal matter, if the materials can be separated, the owner, without whose knowledge the materials have been mixed, may demand their division.—If the materials cannot be separated without inconvenience, the parties acquire the ownership of the thing in common, in proportion to the quantity, quality and value of the materials belonging to each.—ff. L. 12, § 1, De adq. rer.; L. 5, De rei vend.; Poth. Prop. n. 175, 190, 191; 3 Toul. 78; 5 P. Fr. 157, 222; C. N. 573. [I. 463.]

438. If the material belonging to one of the proprietors be much superior in quantity and price, in that case the proprietor of the material of superior value may claim the thing produced by the admixture, on paying to the other the value of his material—ff. Arg. ex lege 27, De adq. rer., Poth. Prop. n. 192; 3 Toul. 78; C. N. 574. [I. 465.]

439. When the thing remains in common among the proprietors of the materials from which it is made, it must be disposed of by licitation for the common benefit, if any one of them demand it.—ff. L. 5, de rei vend.; Inst. l. 1, t. 2, § 28, De rer. div; Poth. Prop. n. 192; 2 Bous. 75; 5 P. Fr. 156 --; 2 Marc. 432; C. N. 575. [I. 465.]

440. In all cases where a proprietor whose material has been employed without his consent, to make a thing of a different description, may claim the proprietorship of such thing, he has the choice of demanding the restitution of his material in the same kind, quantity, weight, measure and quality, or its value.—Poth. Prop. n. 191, 2; 5 P. Fr. 223; 2 Bous. 76; 2 Marc. 432, n. 453; C. N. 576. [I. 465.]

441. Whoever is bound to give back a moveable object upon which he has made improvements or additions for which he is entitled to be reimbursed, may retain such object until he has been so reimbursed, without prejudice to his personal remedy.—[III. 377.]

442. Persons who have employed materials belonging to others and without their consent, may be condemned to pay damages if any there be.—C. N. 577. [I. 465.]

TITLE THIRD.

OF USUFRUCT, USE AND HABITATION.

CHAPTER FIRST.

OF USUFRUCT.

443. Usufruct is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserving the substance thereof—ff. L. 1, 2, 4, De usuf. et q.; L. 28, De verb. sig.; Inst. l. 2 t. 4, in pr.; Poth. Dou. n. 194, 209, 215-218, 220; Id. Vente, n. 548; 2 Bous. 77; 2 Marc. 444 --; 2 Mal. 50; 7 Lo. 218 --; C. N. 578. [I. 465.]

444. Usufruct may be established by law, or by the will of man.—ff. L. 6, § 1, De usuf. etc.; Poth. Vente, n. 548; Guy. Usufruit, 393; C. P. 230, 314, 249, 255, 262; 2 Bous. 78; 5 P. Fr. 231 --; 2 Marc. 447; 2 Mal. 50, 1; C. N. 579. [I. 465.]

445. Usufruct may be established purely or conditionally, and may commence at once or from a certain day.—ff. L. 4, De usuf. etc.; Lac. Usufruit, n. 8, p. 817; 5 P. Fr. 241; 2 Marc. 449; C. N. 580. [I. 465.]

446. It may be established upon property of all kinds, moveable or immoveable.—ff. L. 3, § 1, 7, De usuf. etc.; Lac. Usufruit, 817, n. 4; 2 Marc. 449 --; C. N. 581. [I. 465.]

SECTION I.

Of the rights of the usufructuary.

447. The usufructuary has the right to enjoy every kind of fruits, whether natural, industrial or civil, which the thing subject to the usufruct can produce.—ff. L. 1, 7, 9, 15, 59, 68, De usuf. etc.; Poth. Dou. n. 194, 199, 200; Poth. Prop. n. 153; 3 Toul. 261; 5 P. Fr. 242; C. N. 582. [I. 467.]

448. Natural fruits are those which are the spontaneous produce of the soil. The produce and the increase of animals are also natural fruits.—The industrial fruits of the soil are those obtained by the cultivation or working thereof.—

ff. L. 77, De verb. sig.; L. 36, § 5, De her. pet.; Poth. Dou. n. 198, 199, Com. n. 115; 3 Toul. 262; 5 P. Fr. 161, 245; C. N. 583. [I. 467.]

449. Civil fruits are the rent of houses, interest of sums due and arrears of rents. The rent due for the lease of farms is also included in the class of civil fruits.—ff. L. 121, De verb. sig.; L. 36, De u. et fruc., L. 62, De rei vend.; Poth. Dou. n. 203, 204, Com. n. 205, 221; 5 P. Fr. 161, 245 --; 2 Henn. 366; 3 Toul. 263; C. N. 584. [I. 467.]

450. Natural and industrial fruits attached by branches or roots, at the moment when the usufruct is open, belong to the usufructuary.—Those in the same condition at the moment when the usufruct ceases, belong to the proprietor, without recompense on either side for ploughing or sowing, but also without prejudice to the portion of the fruits which may be acquired by a farmer on shares, if there be one at the commencement or at the termination of the usufruct.—ff. L. 27, L. 58, L. 59, De usuf. etc.; L. 13, Quib. mod. usuf. et us.; L. 32, L. 42, De u. et usuf.; C. P. 231; Poth. Dou. n. 160, 194, 199, 202, 273, 275; Id. Com. n. 206-7-9, 212-3; Id. C.O. t. 10; Id. Mand. n. 192; 3 Toul. 264; 5 P. Fr. 248 --; N. D. Fruits, § 3, n. 3; 3 P. Poul. 290, 1; C. N. 585. [I. 467.]

451. Civil fruits are considered to be acquired day by day, and belong to the usufructuary in proportion to the duration of his usufruct.—This rule applies to rent from the lease of farms, as it does to the rent of houses and to other civil fruits.—ff. L. 7, De sol. matrim.; L. 26, De usuf. et q.; Poth. Dou. n. 160 & 205; Id. Com. n. 220, 1; C. N. 586 [I. 467.]

452. If the usufruct comprise things which cannot be used without being consumed, such as money, grain, liquors, the usufructuary has the right to use them, but subject to the obligation of paying back others of like quantity, quality and value, or their equivalent in money, at the end of the usufruct.—ff. L. 7, De usuf. ear. rer.; Lac. Usufruit, n. 4, p. 817; Poth. Don. M. n. 215; 2 Mal. 55, 63; 2 Henn. 251 --; 5 P. Fr. 251; 3 Toul. 259; Merl. Usufruit, § 4, n. 8; C. N. 587. [I. 467.]

453. The usufruct of a life-rent gives also to the usufructuary, during the period of his usufruct, the right to retain the whole of the payments that he has received as payable in advance, without being obliged to make any restitution.—Poth. Dou. n. 25; Id. Don M. n. 219; Id. Com. n. 232; 2 Mal. 55; 5 P. Fr. 245; Lac. Usufruit, n. 4, p. 817; 2 Henn. 248, 9; C. N. 588. [I. 467.]

454. If the usufruct comprise things which, without being at once consumed, deteriorate gradually by use, as linen or furniture, the usufructuary has the right to use them for the purpose for which they are destined, and, at the end of the usufruct, he is only obliged to restore them in the condition

in which they may be, and not deteriorated by his fraud or fault.—ff. L. 15, § 1, 2, 3, 4, De usuf. etc.; L. 9, § 3, Usuf. quem.; Poth. Dou. n. 194, 209, 215-218, 220; Id. Vente, n. 549; 2 Mal. 56; Merl. Usufruit, § 2, n. 3, § 4; 5 P. Fr. 252; 3 Toul. 248, 324; 1 Proud. Usufruit, n. 67; 2 Id. n. 887, 1056, 1081, 1111; 3 Id. n. 1726; 4 Id. n. 2234; 5 Id. n. 2579, 2651; 2 Bous. 84, 5; Dom. l. 1, Usufruit, t. 11, § 3; C. N. 589. [I. 469.]

455. The usufructuary cannot fell trees which grow on the land subject to the usufruct. Whatever he may require for his own use must be taken from those which have fallen accidentally.—If however among the latter there be not a sufficient quantity of a suitable kind for the repairs to which he is obliged, and for the keeping in repair and the working of the estate, he has a right to fell whatever may be required for these purposes, conformably to the usage of the place, or to the custom of proprietors; he may even fell trees for fuel, if there be any of the kind generally used in the locality for that purpose.—ff. L. 12, De usuf. et q.; Lac. Usufruit, n. 7, p. 819, 823; Poth. Dou. n. 197; 5 P. Fr. 259; 3 Proud. Usufruit, 55, n. 1194; N. D. Baliveaux, § 4; 3 Toul. 271, *n.* (1.) C. N. 590, 591, 592, 593. [I. 469.]

456. Any fruit trees which die, even those which are uprooted or broken by accident, belong to the usufructuary, but he is obliged to replace them by others, unless the larger proportion has been thus destroyed, in which case he is not obliged to replace them.—ff. L. 12, Du usuf. et q.; Poth. Dou. n. 210, 211; 3 Toul. 271; 3 Proud. 1175, 1199; 5 P. Fr. 262; C. N. 594. [I. 469.]

457. The usufructuary may enjoy his right by himself, or lease it, and may even sell it or dispose of it gratuitously.—If he lease it, the lease expires with his usufruct; nevertheless the farmer or the tenant has a right and may be compelled to continue his enjoyment during the rest of the year which had begun before the usufruct expired; subject to the payment of the rent to the proprietor. — ff. L. 12, L. 67, De usuf. et q.; L. 9, Loc. cond.; Poth. Dou. n. 195, 220, 270, Vente, n. 549; Id. Louage, n. 43; Lac. Usufruit, n. 15, p. 825; Loy. Déguerpissement, l, 6, c. 1, n. 6; 3 Toul. n. 413, p. 273; 3 Proud. Usufruit, n. 1212, 1215; 10 Demol. n. 349, p. 309; C. N. 595. [I. 469.]

458. The usufructuary enjoys any augmentation caused by alluvion to the land of which he has the usufruct.—But his right does not extend to islands formed during the usufruct near the land which is subject to it and to which such islands belong.—ff. L. 9, § 4, De usuf. etc.; Poth. Dou. n. 68; 2 Mal. 60; 5 P. Fr. 263, 4; 2 Bous. 89; C. N. 596. [I. 469.]

459. He enjoys all rights of servitude, of passage, and generally all the rights of the proprietor in the same manner as the proprietor himself.—ff.

L. 12. Com. praed.; L. 20. § 1, Si serv. vind.; L. 25, De serv. praed. rust.; Poth. Dou. n. 195, 209, 210; 2 Mal. 60; 2 Bous. 89; 5 P. Fr. 264,5; 3 Toul. 262, 273; Merl. Usufruit, § 4, n. 11; C. N. 597. [I. 471.]

460. Mines and quarries are not comprised in the usufruct of land.—The usufructuary may nevertheless take therefrom all the materials necessary for the repair and maintenance of the estate subject to his right. If however these quarries, before the opening of the usufruct, have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it has been begun.—Poth. Dou. n. 195, Com. n. 97, 204; Id. C. O. t. 10, n. 100; 10 Demol. n. 433; Id. n. 430, p. 376; Pro. Code N. l. 2, t. 3, a. 23, p. 146; Merl. Usufruit, § 4, n. 3; 2 Mal. on a. 598, i. f. p. 62; C. N. 598. [I. 471.]

461. The usufructuary has no right over treasure found, during the usufruct, on the land which is subject to it.—ff. L. 7, § 12, sol. matr.; Ser. Inst. 91; 1 Desp. n. 9, p. 558; Poth. Dou. n. 196; 5 P. Fr. 266,7; C. N. 598. [I. 471.]

462. The proprietor cannot, by any act of his whatever, injure the rights of the usufructuary.—On his side, the usufructuary cannot, at the cessation of the usufruct, claim indemnity for any improvements he has made, even when the value of the thing is augmented thereby.—He may however take away the mirrors, pictures and other ornaments which he has placed there, but subject to the obligation of restoring the property to its former condition.—ff. L. 15, § 6, 7; L. 16, De usuf. etc; ff. L. 12, De u. et usuf.; Poth. Dou. n. 241-3, 271, 277-9; Id. Prop. n. 12; Fen. Poth. on a. 524, p. 126; 2 Mal. 63; 2 Bous. 91,2; 3 Toul. 12, 284, 285, 292--, 306; 5 P. Fr.267 --, n. 37, 38; Proud. n. 1108, 1124, 1426, 1463; C. N. 599. [I. 471.]

SECTION II.

Of the obligations of the usufructuary.

463. The usufructuary takes the things in the condition in which they are; but he can only enter into the enjoyment of them after having caused an inventory of the moveable property and a statement of the immoveables subject to his right to be drawn up, in the presence of or after due notice given to the proprietor, unless he is dispensed from doing so by the act constituting the usufruct.—ff. L. 65, § 1, De usuf.; L. 12, De u. et usuf.; L. 1, i. p. & § 4, usuf. quem. cav.; Cod. L. 4, § 1, De usuf. et hab.; Ser. Inst. 148, 310; Poth. Dou. n. 221-8, Don. M. n. 44, 212, 215, 240; Guy. Usufruit, 393; Merl. Usufruit, § 2, n. 2; 2 Mal. 65, 6, 279; 1 Arg. 202; 5 P. Fr. 271-3; 10 Demol. 473,4; 3 Toul. n. 419, 420; C. N. 600. [I. 471.]

464. He gives security to enjoy the usufruct as a prudent

administrator, unless the act creating it exempts him from so doing; nevertheless the vendor or donor who has reserved the usufruct is not obliged to give security.—ff. L. 2, L. 7, L. 9, § 1, Usuf. quem.; Cod. L. 1, De usuf. et hab.; Poth. Dou. n. 211, 221; C. P. 285; Lac. Usufruit, 818 --, n. 1 --; Guy. Usufruit, 393, 4; 1 Arg. 204; 3 Toul. 279, 280; Fen. Poth. on a. 601, p. 154; 5 P. Fr. 275 --, n. 41 --; 10 Demol. n. 480 --; C. N. 601. [I. 471.]

465. If the usufructuary cannot give security, the immoveables are leased, farmed or sequestrated. — Sums of money comprised in the usufruct are invested; provisions, and other moveable things which are consumable by use, are sold, and the price produced is likewise invested.—The interest of such sums of money, and the rent from leases belong in these cases to the usufructuary.—ff. L. 5, § 1, Ut leg. seu. fid.; Car. on a. 285, C. P.; Poth. Dou. n. 227; 2 Marc. 483 --; Lac. Usufruit, n. 1, p. 819; Guyp. Q. 250; 5 P. Fr. 281, 2; Ric. Don mut. n. 285; 10 Demol. n. 493 --; 2 Proud. Usufruit, n. 840 --; C. N. 602. [I. 473.]

466. In default of security the proprietor may require that moveable property liable to be deteriorated by use, be sold in order that the price may be invested and received as in the preceding article.—Nevertheless the usufructuary may demand and the court may grant, according to circumstances, that a portion of the moveables necessary for his use may be left to him on the simple security of his oath, and subject to the obligation of producing them at the expiration of the usufruct.—ff. L. 5, § 1, Ut leg. seu fid.; Inst. De satisd. § 2; 1 Salv. 142; Poth. Dou. n. 227; Ser. Inst. 105, 6; Cit. under a. 465; C. N. 603. [I. 473.]

467. The delay to give security does not deprive the usufructuary of whatever fruits he is entitled to; they are due to him from the moment the usufruct is open.—ff. L. 10, § 1, De usuf. ear.; Inst. § 3, De fidej.; Lac. Usufruit, n. 1, p. 818; 5 P. Fr. 283; 2 Mal. 69; 10 Demol. 516, p. 445; C. N. 604. [I. 473.]

468. The usufructuary is only liable for the lesser repairs. For the greater repairs the proprietor remains liable, unless they result from the neglect of the lesser repairs since the commencement of the usufruct, in which case the usufructuary is also held liable.—ff. L. 7, § 2, L. 13, De usuf. et q.; Cod. L. 7, De usuf.; Poth. Dou. n. 238, 239, 280; Id. Don. M. 236-8; Id. B. R. n. 43; Id. Com. n. 272; Lac. Usufruit, s. 2, n. 11; 5 P. Fr. 284-5; 2. Mal. 69; C. N. 605. [I. 473.]

469. The greater repairs are those of main walls and vaults, the restoration of beams and the entire roofs and also the entire reparation of dams, prop-walls and fences.—All other repairs are lesser repairs.—ff. L. 7, De usuf. et q.; C. P. 262; Poth. Dou. n. 238; Id.

Com. n. 272; 2 Bour. 34; Lac. Usufruitier, s. 2, n. 11; 2 Mal. 70; 5 P. Fr. 287, 8; 10 Demol. n. 551 --, 582; C. N. 606. [I. 473.]

470. Neither the proprietor nor the usufructuary is obliged to rebuild what has fallen into decay or what has been destroyed by unforeseen event.—ff. L. 7, § 2, L. 46, § 1, L. 65, § 1, De usuf. etc.; Dom. De l'usuf. s. 5, n. 5; 5 P. Poul. 324, n. 411; 2 Desg. on a. 262, C. P. 29 --; Poth. Dou. n. 238, 239, 246; Id. Don. M. n. 238; Lac. Usufruit, n. 12, p. 821; 3 Toul. n. 443 --, p. 296 --; 2 Mal. 71; 2 Marc. 448 --; 5 P. Fr. 289 --; 10 Demol. n. 707; Ser. Inst. 108; C. N. 607. [I. 473.]

471. The usufructuary is liable, during his enjoyment, for all ordinary charges, such as ground-rents and other annual dues and contributions encumbering the property when the usufruct begins.—He is likewise liable for all charges of an extraordinary nature imposed thereupon since that time, such as assessments for the erection and repair of churches, public and municipal contributions and other like burthens.—ff. L. 27, § 3, 4, L. 7, § 2, L. 52, De usuf. etc.; ff. L. 28, De u. et usuf.; C. P. 287; Lac. Usufruit, n. 14; Car. Pand. l. 2, c. 13; Poth. Don. M. n. 236, 242; Id. Dou. n. 230; Guy. Usufruit, 396; Fen. Poth. on a. 608, p. 157 --; 2 Mal. 71; 5 P. Fr. 291 --; 3 Toul. n. 431; 2 Marc. 493 --; 2 Henn. 445; 2 Dem. n. 451 bis; 10 Demol. 550 --, n. 601 --; C. N. 608, 609. [I. 475.]

472. A legacy made by a testator of a life-rent or alimentary pension, must be entirely paid by the universal legatee of the usufruct, or by the legatee by general title of the usufruct according to the extent of his enjoyment, without any recourse in either case.—Cod. L. ult. § 4, De bon. q. lib.; A. D. Usufruit, n. 36; Guy. Usufruit, 396; 2 Mal. 72; 5 P. Fr. 294; 7 Lo. E. C. 299-302; 4 Dur. n. 636, 7; 2 Boi. 763; C. N. 610. [I. 475.]

473. A usufructuary by particular title is not liable for the payment of any part of the hereditary debts, not even of those for which the land subject to the usufruct is hypothecated.—If he be forced, in order to retain his enjoyment, to pay any of these debts, he has his recourse against the debtor and against the proprietor of the land.—ff. L. ult. de u. et Usuf.; Lac. Legs, p. 403, Usufruit, n. 15; Guy. Usufruit, 396; 2 Marc. n. 531 --, p. 501 --; 2 Boi. 759 --; 7 Lo. 304; 5 P. Fr. 295; 10 Demol. n. 604; 2 Toul. n. 432; 4 Proud. Usufruit, n. 1829, 1843; Dal. D. Usufruit, 572; C. N. 611. [I. 475.]

474. A general usufructuary or a usufructuary by general title must contribute with the proprietor to the payment of the debts as follows:—The immoveables and other things subject to the usufruct are valued, and the contribution to the debts is fixed in proportion to such value.—If the usufructuary advance the sum for which the proprietor must

contribute, the capital of it is restored to him at the expiration of the usufruct, without interest.—If the usufructuary will not make this advance, the proprietor has the choice either of paying the sum, and in such case the usufructuary is obliged to pay him the interest thereon during the continuance of the usufruct, or of causing a sufficient portion of the property subject to the usufruct to be sold.—Cod. L. 15, De don.; Darg. on a. 219, C. Br.; Guyp. Q. 541; Lap. let. V, n. 75; Lac. Dettes, 172, n. 13, & p. 821; C. P. 334, 335; 5 N. D. Contrib. aux dettes, 499; 17 Guy. 396; 2 Boi. 761, 2; 2 Marc. 500, n. 529; C. N. 612. [I. 475.]

475. The usufructuary is only liable for the costs of such suits as relate to the enjoyment, and for any other condemnations to which these suits may give rise.—ff. L. 60, De usuf.; L. 5, si usuf.; Lac. Usuf. 821; 10 Demol. n. 619 --; 3 Toul. 289; 2 Boi. 767; 2 Marc. 574; 2 P. Fr. 299; C. N. 613. [I. 477.]

476. If during the continuance of the usufruct, a third party commit any encroachments on the land, or otherwise attack the rights of the proprietor, the usufructuary is obliged to notify him of it, and in default thereof he is responsible for all the damage which may result therefrom to the proprietor, in the same manner as he would be if the injury were done by himself.—ff. L. 15, § 7, de usuf.; L. 1, § 7, L. 2, Usuf. quem.; Poth. Dou. n. 281, 2; Fen. Poth. 159; 2 Boi. 768, n. 614; 2 Marc. 506, on a. 614; C. N. 614. [I. 477.]

477. If an animal only be the subject of the usufruct, and it perish without the fault of the usufructuary, he is not bound to give back another, nor to pay its value.—ff. L. 70, § 3, De usuf.; A. D. Usufruit, § 2, n. 6; 2 Mal. 75; 3 Toul. 291; C. N. 615. [I. 477.]

478. If the usufruct be created on a herd or flock, and it perish entirely by accident or disease, and without the fault of the usufructuary, he is only obliged to account to the proprietor for the skins or their value.—If the flock do not perish entirely, the usufructuary is obliged to replace the animals which have perished, up to the number of the increase.—ff. L. 68, § 2, L. 69, L. 70, § 1-5, De usuf.; Inst. De div. rer. § 38; 5 P. Fr. 302--, 2 Toul. 291; 2 Mal. 76; 2 Boi. 765, 6; C. N. 616. [I. 477.]

SECTION III.

Of the termination of usufruct.

479. Usufruct ends by the natural or civil death of the usufructuary, if for life;—By the expiration of the time for which it was granted;—By the confusion or reunion in one person of the two qualities of usufructuary and of proprietor;—By non-user of the right during thirty years, and by prescription acquired by third persons;—By the total loss of

the thing on which the usufruct is established.—ff. L. 3, § ult. L. 17, L. 27, Quib. mod., &c.; ff. L. 8, De an. leg.; ff. L. 22, L. 29, De u. et usuf.; ff. L. 10, De cap. min.; Cod. L. 12, L 14, L. 16, De usuf.; Inst. De usuf. § 3; Cod. L. 13, De servi. & aq.; L. 3, De prescr. § 30, vel 40; Poth. Dou. n. 247, 249, 255, 74, 253, 268; Poth. Don. M. n. 252 --; Poth. Vente, n. 549; D. 136; Merl. Usuf. § 5, a. 1, a. 3, n. 3; Guy. Usufruit, 402 --; Lac. Usufruit, s. 4, p. 827 --; Ser. Inst. 106-8; 5 P. Fr. 307, n. 62-68; 2 Boi. 771 --; C. N. 617. [I. 477.]

480. Usufruct may also cease by reason of the abuse the usufructuary makes of his enjoyment, either by committing waste on the property or by allowing it to depreciate for want of care.—The creditors of the usufructuary may intervene in contestations, for the preservation of their rights; they may offer to repair the injury done and give security for the future.—The courts may, according to the gravity of the circumstances, either pronounce the absolute extinction of the usufruct, or only permit the entry of the proprietor into possession of the object charged with it, subject to the obligation of annually paying to the usufructuary or to his representatives a fixed sum, until the time when the usufruct shall cease.—ff. L. 38, De rei vind.; Inst. De usuf. § 3; Pap. Arr. l. 14, t. 2, a. 6; Mor. on L. 4, Cod. De usuf.; Fa. Cod. l. 3, t. 3, défin. 1; Mey. l. 8, c. 7; Guy. Usufruit, § 4, p. 405 --; Lac. Usufruit, n. 18, p. 830; Poth. Dou. n. 249; 5 P. Fr. 324 --; C. N. 618. [I. 477.]

481. A usufruct which is granted without term to a corporation only lasts thirty years.—ff. L. 68, Ad leg. falc.; Dom. t. 11, de l'usuf. p. 310; Dun. Pres. 211, 2; Ser. Inst. 107; Lac. Usufruit, 828, n. 7; Guy. Usufruit, 403; 5 P. Fr. 327,8; 2 Mal. 79; C. N. 619. [I. 479.]

482. A usufruct granted until a third party reaches a certain fixed age, continues until such time, although the third person should die before that age.—Cod. L. 12, De usuf.; Guy. Usufruit, 407, § 5; Merl. Mort civ. § 1, a. 3, n. 11; 3 Toul. n. 450; C. N. 620. [I. 479.]

483. The sale of a thing subject to usufruct does not in any respect change the right of the usufructuary; he continues to enjoy his usufruct, unless he has formally renounced it.—ff. L. 17, § 2, De usuf. et quem.; ff. L. 19, Quib. mod. usuf.; 5 P. Fr. 315, 332; 3 Toul. 251, 293, 321, 322; 2 Mal. 80; C. N. 621. [I. 479.]

484. The creditors of the usufructuary may have his renunciation annulled, if it be made to their prejudice.—ff. L. 10, L. 15, Quæ in fraud. cred.; 2 Mal. 80; 5 P. Fr. 332; 2 Marc. 560, p. 528; C. N. 622. [I. 479.]

485. If only a part of the thing subject to the usufruct perish, the usufruct continues to exist upon the remainder.—ff. L. 34, § 2, L. 53, De usuf. et

quem.; Ser. 108; Guy. Usufruit, 404; Lac. Usufruit, s. 6, n. 14, p. 829; 3 Toul. 320; 5 P. Fr. 333; 2 Mal. 81; C. N. 623. [I. 479.]

486. If the usufruct be established upon a building only, and such building be destroyed by fire or other accident, or fall from age, the usufructuary has no right to enjoy either the ground or the materials.—If the usufruct be established on a property of which the building destroyed formed part, the usufructuary enjoys the ground and the materials.—ff. L. 5, § 2, L. 9, L. 10, Quib. mod. usuf.; ff. L. 34, § ult. L. 36, de usuf. et quem.; Inst. de usuf. § 3, i. f.; Ser. 108; Lac. Usufruit, 829; 5 P. Fr. 318, 333; 2 Boi. 783; Fen. Poth. on a. 624, p. 162; 10 Demol. n. 704-711; C. N. 624. [I. 479.]

CHAPTER SECOND.

OF USE AND HABITATION.

487. A right of use is a right to enjoy a thing belonging to another and to take the fruits thereof, but only to the extent of the requirements of the user and of his family.—When applied to a house, right of use is called right of habitation.—ff. De u. et hab. t. t.; Lac. Usage, 814, Habitation, 326; Poth. Habitation, n. 1 --; Guy. Usage, 378; Merl. Habitation, 191; 5 Proud. 2739 --, 2 Boi. 784, 5; 2 Marc. 534; 5 P. Fr. 237; 2 Henn. p. [I. 479.]

488. Rights of use and habitation are established only by the will of man, by deed *inter vivos* or by last will.—They cease in the same manner as usufruct.—Poth. Hab. n. 22 --; N. D. Habitation, § 4, p. 569; Merl. Habitation; 2 Marc. n. 568, p. 535; 2 Boi. 785, n. (2); C. N. 626. [I. 481.]

489. These rights cannot be exercised without previously giving security, and making statements and inventories as in the case of usufruct.—ff. L. 13, De usuf. et quem; L. 1, usuf. quem.; Cod. De usuf. et hab.; Poth. Hab. n. 20; Merl. s. 1, § 2, n. 6, p. 199; C. N. 626. [I. 481.]

490. He who has a right of use or of habitation, must exercise it as a prudent administrator.—Cod. Arg. ex L. 4, De usuf. et hab.; 7 Lo. 337; C. N. 627. [I. 481.]

491. Rights of use and of habitation are governed by the title which creates them, and are more or less extensive according to its dispositions.—Poth. Hab. n. 17, 31; N. D. Habitation, 563; Proud. Usufruit, n. 2768; C. N. 628. [I. 481.]

492. If the title be not explicit as to the extent of these rights, they are governed as follows.—C. N. 629. [I. 481.]

493. He who has the use of land is only entitled to so much of its fruits as is necessary for his own wants and those of his family.—He may even take what is required for the wants of children born to him after the grant of the right of use.—ff. L. 12, L. 19, De u. et hab.; 2 Boi. 788; 2 Marc. 537; Proud. 2768; 2 Mal. 83; C. N. 630. [I. 481.]

494. He who has a right of use can neither assign nor lease it to another.—ff. L. 2, L. 8, L. 11, De u. et hab.; 2 Boi. 791; 2 Marc. 538; Merl. Habit. s. 1, § 2, p. 196; C. N. 631. [I. 481.]

495. He who has a right of habitation in a house may live therein with his family, even if he were not married when such right was granted to him. —ff. L. 2, L. 3, L. 4, L. 5, L. 6, L. 7, L. 8, De u. et hab.; Poth. Habit. n. 18; Lam. Arr. t. 35, a. 13, p. 233; C. N. 632. [I. 481.]

496. A right of habitation is confined to what is necessary for the habitation of the person to whom it is granted and his family.—ff. l. c.; Poth. Habit. n. 33; Merl. Habit. s. 1, § 3, n. 6; C. N. 633. [I. 481.]

497. A right of habitation can neither be assigned nor leased.—ff. L. 8, De u. et hab.; Inst. De u. et hab. § 5; Poth. Habitation, n. 18; Merl. Habitation, 196; Proud. 2345; C. N. 634. [I. 481.]

498. If he who has the use take all the fruits of the land, or if he occupy the whole of the house, he is subject to the costs of cultivation, to the lesser repairs, and to the payment of all contributions, like the usufructuary.—If he only take a portion of the fruits, or if he only occupy a part of the house, he contributes in the proportion of his enjoyment.—ff. L. 18, De u. et hab.; Ser. Inst. 109; Poth. Habit. n. 21, 22, 33; Merl. Habit. p. 200, s. 1, § 2; Proud. Usuf. n. 2762, 2786, 2793, 2823; 5 P. Fr. 340; C. N. 635. [I. 483.]

TITLE FOURTH.

OF REAL SERVITUDES.

GENERAL PROVISIONS.

499. A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor.—ff. L. 15, § 1, De serv.; Ib. t. t. 8; Inst. l. 2, t. 3; Poth. C. O. t. 13, n. 2-4; Merl. Serv. § 1; 2 Mal. 85, 6; 7 Lo. E. C. 348, 9 --; 2 Marc. 557, n. 558; C. N. 637. [I. 483.]

500. It arises either from the natural position of the property, or from the law, or it is established by the act of man. —ff. L. 2, De aq. et aq.; 1 Pr. de la Jan. 353; Lal. Servitude, 14; 2 Lau. C. P. 165; 2 Mal. 86; Rog. on a. 639; C. N. 639. [I. 483.]

CHAPTER FIRST.

OF SERVITUDES WHICH ARISE FROM THE SITUATION OF PROPERTY.

501. Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man.—The proprietor of the lower land cannot

raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land.—ff. L. 1, § 13, 23; L. 2, § 1, De aq. et aq.; Lam. Arr. t. 20, a. 7; Poth. Société, 235-6-7-9; Merl. Eaux pluviales, n. 2,3; 2 Marc. 559, 560; 3 Toul. 356 --; Lal. Servitudes, 19; Car. Pand. l. 4, c. 22, t. 1; 2 Bous. 126; C. N. 640. [I. 483.]

502. He who has a spring on his land may use it and dispose of it as he pleases.—Cod. L. 6, De serv. et aq.; ff. L. 1, § 12; L. 21, L. 26, De aq. et aq.; Lam. Arr. t. 20, a. 6; Dun. Pres. p. 88, 89; 2 Hen. l. 4, q. 75; 2 Fav. de Langlade, 221 --; 2 Mal. 88; 5 P. Fr. 368; 7 Lo. 368,9 --; C. N. 641. [I. 483.]

503. He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs; saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments.—He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.—ff. L. 26, De damno inf.; 5 N. D. Cours d'eau, 651, n. 3; Dun. Pres. 88; 2 Hen. l. 4, q. 189; O. 1669, t, 27, a. 44; Guy. Cours d'eau, 135,6; 2 Bas. Servitudes, 489; Merl. Cours d'eau, n. 3; 1 Dem. n. 661; 2 Bous. 130 --; 2 Marc. 569; 2 Mal. 91; C. N. 644. [I. 483.]

504. Every proprietor may oblige his neighbour to settle the boundaries between their contiguous lands.—The costs of so doing are common; those of the suit, in case of contestation, are in the discretion of the court.—Cod. L. 5, com. div.; Poth. Soc. 231-3; 1 Four. V. 240; 3 N. D. Bornage, 654, 5; 2 Bous. 134 --; 2 Mal. 93; 5 P. Fr. 379; 3 Toul. n. 180; 1 Par. Servitudes, n. 129; 3 Ency. 250; Mil. Bornage, 552; Sol. Servitudes, 87, n. 78; C. N. 646. [I. 485.]

505. Every proprietor may oblige his neighbour to make in equal portions or at common expense, between their respective lands, a fence or other sufficient kind of separation according to the custom, the regulations and the situation of the locality.—2 Ed. & O. 272, 444; 13 & 14 V. c. 40, s. 2-9; C. S. L. C. c. 26, s. 32, 33; C. P. a. 209-213; 5 P. Fr. 394 --; 2 Mal. 93, 4; Poth. C. O. t. 5; 3 Guy. Clôture, p. 596 --; 4 N. D. Clos, 571 --; C. N. 647, 648. [I. 485.]

CHAPTER SECOND.

OF SERVITUDES ESTABLISHED BY LAW.

506. Servitudes established by law have for their object public utility or that of individuals.—C. N. 649. [I. 485.]

507. Those established for

public utility have for their object the foot-road or tow-path along the banks of navigable or floatable rivers, the construction or repair of roads or other public works.—Whatever concerns this kind of servitude is determined by particular laws or regulations.—C. N. 650. [I. 485.]

508. The law subjects proprietors to different obligations with regard to one another independently of any stipulation. C. N. 651. [I. 485.]

509. Some of these obligations are governed by laws concerning municipalities and roads.—The others relate to division walls and ditches, to cases where a counter-wall is necessary, to views upon the property of a neighbour, to the eaves of roofs, and to rights of way. C. N. 652. [I. 485.]

SECTION I.

Of division walls and ditches, and of clearance.

510. Both in town and country, walls serving for separation between buildings up to the required heights, or between yards and gardens, and also between enclosed fields, are presumed to be common, if there be no title, mark or other legal proof to the contrary.—C. P. 211; Lam. Arr. t. 20, a. 30; Poth. Ob. 844, Soc. 201-6, C. O. t. 13, a. 234; Merl. Mitoyenneté, § 1, n. 2-5; 2 Mal. 95, 6; 1 Dem. 361; 5 P. Fr. 404-5-7; 7 Lo. 410 --; 2 Marc. 575; C. N. 653. [I. 485.]

511. It is a mark that a wall is not common when its summit is straight and plumb with the facing on one side, and on the other exhibits an inclined plane; and also when one side only has a coping, or mouldings, or corbels of stone, placed there in building the wall.—In such cases the wall is deemed to belong exclusively to the proprietor on whose side are the eaves or the corbels and mouldings.—C. P. 214; Desg. 390; 1 Lep. 43, 4; Lam. t. 20, a. 31; Poth. Soc. n. 205, C. O. t. 13, a. 241; 5 P. Fr. 409; 2 Mal. 96, 7; 1 Dem. 361; 2 Marc. 577; C. N. 654. [I. 487.]

512. The repairing and rebuilding of a common wall are chargeable to all those who have any right in it, in proportion to the right of each.—C. P. 205; Poth. Soc. 219; 220-2; Desg. 278 --; 3 Toul. 131-133; Merl. Mitoyenneté, § 2, n. 1; 5 P. Fr. 409 --; C. N. 655. [I. 487.]

513. Nevertheless every coproprietor of a common wall may avoid contributing to its repair and rebuilding by abandoning his share in the wall and renouncing his right of making use of it.—C. P. 210; Desg. 377; Poth. Soc. n. 221; 2 Marc. 378, 9; 2 Mal. 97; 5 P. Fr. 416; C. N. 656. [I. 487.]

514. Every coproprietor may build against a common wall and place therein joists or beams, to within [four inches] of the whole thickness of the wall, without prejudice to the right which the neighbour has to force him to reduce the beam to the half thickness of the wall,

in case he should himself desire to put beams in the same place, or to build a chimney against it.—ff. L. 52, § 13, Pro soc.; L. 12, Com. div.; C. P. 198, 207, 208; C. O. 232; Poth. Soc. 207-9; Desg. 205 --; Lam. t. 20, a. 36, 7; 5 P. Fr. 416; 2 Mal. 98; 1 Lep. 58; 7 Lo. 421; C. N. 657. [I. 487.]

515. Every coproprietor may raise the common wall at will, but at his own cost, upon paying an indemnity for the additional weight imposed, and bearing for the future the expense of keeping it in repair above the height which is common.—The indemnity thus payable is the sixth of the value of the superstructure.—On these conditions such superstructure becomes the exclusive property of him who built it; but it remains, as to the right of view, subject to the rules applicable to common walls.—C. P. 195, 197; 2 Lau. 172; Desg. 168, 194; Lam. t. 20, a. 29; Poth. Soc. 200, 212, 213, 222; 2 Mal. 98, 9; 5 P. Fr. 418; 2 Marc. 579, 580; C. N. 658. [I. 487.]

516. If the common wall be not in a condition to support the superstructure, he who wishes to raise it must have it rebuilt at his own cost, and the excess of thickness must be taken on his own side.—C. P. 195; Desg. 174; 2 Lau. 173; Poth. Soc. n. 212, 215, 250, 252; 2 Marc. 580; 5 P. Fr. 419; C. N. 659. [I. 487.]

517. The neighbour who has not contributed to the superstructure may acquire the joint-ownership of it, by paying half of the cost thereof, and the value of one half of the ground used for the excess of thickness, if there be any.—C. P. 195; C. O. 237; Poth. Soc. 217, 252; 5 P. Fr. 419; 2 Mal. 99; 2 Marc. 580; C. N. 660. [I. 487.]

518. Every owner of property adjoining a wall, has the privilege of making it common in whole or in part, by paying to the proprietor of the wall half the value of the part he wishes to render common, and half the value of the ground on which such wall is built.—C. P. 194; Poth. Soc. 247, 248, 250, 251, 254; C. O. t. 13, a. 235, 237; Merl. Vue, § 3, n. 8; 5 P. Fr. 420,1; 2 Marc. 581; C. N. 661. [I. 489.]

519. One neighbour cannot make any recess in the body of a common wall, nor can he apply or rest any work there, without the consent of the other, or on his refusal, without having caused to be settled by experts the necessary means to prevent the new work from being injurious to the rights of the other.—C. P. 199, 203; C. O. 231; Poth. Soc. n. 218; Desg. 218; 5 P. Fr. 422 --; 2 Mal. 99-101; C. N. 662. [I. 489.]

520. Every person may oblige his neighbour, in incorporated cities and towns, to contribute to the building and repair of the fence-wall separating their houses, yards and gardens situated in the said cities and towns, to a height of ten feet from the ground or the level of the street, including the coping, and to a thickness

of eighteen inches, each of the neighbours being obliged to furnish nine inches of ground; saving that he for whom such thickness is not sufficient may add to it at his own cost and on his own land.—C. P. 209; C. O. 236; ff. L. 35, L. 36, L. 37, L. 39, De dam. inf.; Poth. Soc. 192, 223, 234, C. O. t. 13, a. 236; Desg. 209, 236; 5 P. Fr. 432; 2 Mal. 101,2; Per. E. P. Q. 73; Id. E. C. S. 33; C. N. 663. [I. 489.]

521. [When the different stories of a house belong to different proprietors, if their titles do not regulate the mode of repairing and rebuilding, it must be done as follows:—All the proprietors contribute to the main walls and the roof, each in proportion to the value of the story which belongs to him;—The proprietor of each story makes the floor under him;—The proprietor of the first story makes the stairs which lead to it; the proprietor of the second story makes the stairs which lead from the first to his, and so on.—C. O, 257; Lam. t. 20, a. 32; 2 Bous. 146; 7 Lo. 442, 443; 2 P. Fr. 436; C. N. 664. [I. 489.]

522. When a common wall or a house is rebuilt, the active and passive servitudes continue with regard to the new wall or to the new house, provided they are not rendered more onerous, and provided the rebuilding be done before prescription is acquired.—5 P. Fr. 440; 7 Lo. 444; C. N. 665. [I. 489.]

523. All ditches between neighbouring properties are presumed to be common if there be no title nor mark to the contrary.—Poth. Soc. 224; 3 Toul. 154; 7 Lo. 445; 1 Mal. 104; 2 Marc. 585; C. N. 666. [I. 489.]

524. When the embankment or the earth thrown out of a ditch is only on one side of it, it is a mark that the ditch is not common.—Poth. Soc. 224; 2 Bous. 149; 5 P. Fr. 442; C. N. 667. [I. 489.]

525. A ditch is presumed to belong exclusively to him on whose side the earth is thrown out.—Poth. Soc. 224; 3 Toul. 154; C. N. 668. [I. 491.]

526. A common ditch must be kept at common expense.—Poth. Soc. 226; Desg. 399 --; 5 P. Fr. 442 --; 7 Lo. 447; 2 Mal. 104; 2 Marc. 585; C. N. 669. [I. 491.]

527. Every hedge which separates land is reputed to be common, unless only one of the lands is inclosed, or there is a sufficient title or possession to the contrary.—2 Coq. q. 298; 2 Marc. 585 --; Poth. Soc. n. 225, 6; Lam. t. 20, a. 40; Desg. 384; Merl. Haie, n. 3; 3 Toul. 154-6; 7 Lo. 445; 1 Lep. 219; C. N. 670. [I. 491.]

528. No neighbour can plant trees or shrubs or allow any to grow nearer to the line of separation than the distance prescribed by special regulations, or by established and recognized usage; and in default of such regulations and usage, such distance must be determined according to the nature of the trees and their situation, so as not to injure

the neighbour.—ff. L. 13, Fin. reg.; Desg. 386, *n.* (1); 1 Guy. Arbres, 561; Lam. t. 20, a. 41; Poth. Soc. n. 242, C. O. t. 13, a. 259; 1 Four. 134-7-8-9, 141; N. D. Arbres, 247, 8; 1 Lep. 224, 5; 2 Bous. 150; 5 P. Fr. 449 --; 7 Lo. 440 --; Perrin, n. 771 --; Ency. Arbres, 3; 2 Mal. 104, 5; 2 Marc. 590; C. N. 671. [I. 491.]

529. Either neighbour may require that any trees and hedges which contravene the preceding article be uprooted. —He over whose property the branches of his neighbour's trees extend, although the trees are growing at the prescribed distance, may compel his neighbour to cut such branches. —If the roots extend upon his property, he has a right to cut them himself.—ff. L. 1, § 1, 6, 7, de arb. cæd.; Coq. q. 274; Bas. on a. 608, C. Nor.; Four. 134 --; Poth. Soc. n. 243; 5 P. Fr. 453 --; Merl. Arbre, n. 6; Mal. 106; C. N. 672. [I. 491.]

530. Trees growing in a common hedge are common as the hedge itself, and either of the neighbours has a right to have them felled.—ff. L. 13, Fin. reg.; L. 2, de arb. cæd.; Desg. 386; 1 Four. 149-154; Poth. Soc. n. 226; 1 Lep. 228, 231, 2; 3 Toul. 157; C. N. 673. [I. 491.]

531. Every proprietor or occupier of land in a state of cultivation, contiguous to uncleared land, may compel the proprietor or occupier of the latter to fell all trees along the line of separation which are of a nature to injure the cultivated land, and this on the whole length, and on the breadth, in the manner, and at the time determined by law, by regulations having force of law, or by established and recognized usage.—Trees, however, which may be preserved on or near the line, with or without curtailing the branches or roots, according to the three last preceding articles, are excepted. —Fruit trees and maple trees, which may be preserved in all cases near or along the line, but are subject to the same curtailing, are also excepted. —The fine for any contravention does not free one from the necessity of giving the clearance ordered by a competent tribunal, nor from the damages actually incurred since the party was put in default.—C. S. L. C. c. 26, s. 17. [I. 491.]

SECTION II.

Of the distance and the intermediate works required for certain structures.

532. The following provisions are established for incorporated cities and towns :

1. He who wishes to have a well near the common wall or that belonging to his neighbour, must make a counter-wall of masonry one foot thick;

2. He who wishes to have a privy near such walls must make a counter-wall of the same kind [fifteen inches] thick;—If, however, there be a well opposite, on the neighbouring property, the thickness must be [twenty-one-inches;]

3. [When the well or privy is at the distance from the wall

determined by municipal regulations and by established and recognized usage, such counter-wall is no longer required. If there be no such regulations or usage the distance is three feet;]

4. He who wishes to have a chimney, or a hearth, or a stable, or a store for salt or other corrosive substances, near a common wall or wall belonging to his neighbour, or to raise the ground or heap earth against it, is obliged to make a counter-wall or other work, the sufficiency of which is [determined by municipal regulations, by established and recognized usage, and, in default of any such, by the courts in each case;]

5. He who wishes to have an oven, forge or furnace, must leave a vacant space of six inches between his own wall and the common wall or that of his neighbour.—C. P. 118, 119, 120, 121, 122, 188, 189, 190, 191, 192; C. N. 674. [I. 493.]

SECTION III.

Of view on the property of a neighbour.

533. One neighbour cannot, without the consent of the other, make in a common wall any window or opening of any kind whatever, not even those with fixed glass.—ff. L. 10, De serv. præd. urb.; L. 28, Com. div.; Cod. L. 8, De serv. et aq.; C. P. 199; Poth. Soc. n. 217, 240; Lam. t. 20, a. 22; Desg. p. 218-224; C. O. 231; Merl. Vue, § 3, n. 9; 2 P. Fr. 467,8; 7 Lo. 455; C. N. 675. [I. 495.]

534. The proprietor of a wall which is not common adjoining the land of another, may make in such wall lights or windows with iron gratings and fixed glass, that is to say, such windows must be provided with an iron trellis the bars of which are not more than four inches apart, and a window-sash fastened with plaster or otherwise in such a way that it must remain closed.—ff. L. 2, De serv. præd. urb; L. 26, De dam. inf.; C. P. 200, 201; C. O. 229; Lam. t. 20, a. 23; Merl. Vue, § 3, n. 9; Desg. 225, 247; 2 Lau. 175; 2 Mal. 109--; 5 P. Fr. 470 --; C. N. 676. [I. 495.]

535. Such windows or lights cannot be placed lower than nine feet above the floor or ground of the room it is intended to light, if it be on the ground floor; nor lower than seven feet from the floor, if in the upper stories.—C. P. 200; 2 Lau. 175; Desg. 225-242; 7 Lo. 464; C. N. 677. [I. 495.]

536. One neighbour cannot have direct views or prospect-windows, nor galleries, balconies or other like projections overlooking the fenced or unfenced land of the other; they must be at a distance of six feet from such land.—C. P. 202; Poth. C. O. t. 13, n. 2, a. 231; Desg. 247-259; 2 Lau. 176; Lam. t. 20, a. 27; 2 Mal. 110-1; 7 Lo. 467; C. N. 678. [I. 495.]

537. Nor can he have side openings or oblique views overlooking such land, unless

they are at a distance of two feet.—C. P. 202; Desg. 247 --; C. N. 679. [I. 495.]

538. The distances mentioned in the two preceding articles are reckoned from the exterior facing of the wall where the opening is made, and if there be a balcony or other like projection, from the exterior line thereof. — Desg. 247 --; Merl. Vue, § 1, n. 7; 2 Bous. 157; 5 P. Fr. 174; C. N. 680. [I. 495.]

SECTION IV.

Of the eaves of roofs.

539. Roofs must be constructed in such a manner that the rain and snow from off them may fall upon the land of the proprietor, without his having a right to make it fall upon the land of his neighbour.—Poth. Soc. n. 240; Desg. 49 --; Lam. t. 20, a. 6; Poc. Des Servit. l. 2, t. 4, a. 26; 2 Toul. 211; 7 Lo. 473; 5 P. Fr. 475; 2 Mal. 111; C. N. 681. [I. 497.]

SECTION V.

Of the right of way.

540. A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his neigbours for the use of his property, subject to an indemnity proportionate to the damage he may cause. —Poth. Vente, n. 514, 515, Soc. 246, Dou. 210; Lam. t. 20, a. 21; 2 Mal. 112; 5 P. Fr. 478; C. N. 682. [I. 497.]

541. The way must generally be had on the side where the crossing is shortest from the land so enclosed to the public road.—Poth. Vente, 514, 515; Lam. t. 20, a. 21; 2 Mal. 113; C. N. 683. [I. 497.]

542. It should however be established over the part where it will be least injurious to him upon whose land it is granted. —Dom. Servitudes, t. 12, s. 3, n. 2, p. 334; 2 Mal. 114; 7 Lo. 476-500; C. N. 684. [I. 497.]

543. If the land become so enclosed in consequence of a sale, of a partition, or of a will, it is the vendor, the copartioner, or the heir, and not the proprietor of the land which offers the shortest crossing, who is bound to furnish the way, which is in such case due, without indemnity.—ff. L. 22, De cond. indeb; L. 1, § 2, 3, Si usuf. pet.; Grav. L. let. S. l. 3, t. 4; Coq. q. 74, p. 214 --; Lap. let. S, n. 39; 2 Four. Voisinage, 404 --; 2 Mal. 130; 5 P. Fr. 478; 1 Par. Servitudes, 495-8; C. S. 619; C. L. 697, 698. [I. 497.]

544. If the way thus granted cease to be necessary, it may be suppressed, and in such case the indemnity paid is restored, or the annuity agreed upon ceases for the future.—1 Par. Servitudes, 502, 3; C. S. 620; C. C. V. 475. [I. 497]

CHAPTER THIRD

OF SERVITUDES ESTABLISHED BY THE ACT OF MAN.

SECTION I.

Of the different kinds of servitudes which may be established on property.

545. Every proprietor having the use of his rights, and being competent to dispose of his immoveables, may establish over or in favor of such immoveables, such servitudes as he may think proper, provided they are in no way contrary to public order.—The use and the extent of these servitudes are determined according to the title which constitutes them, or according to the following rules if the title be silent.—ff. L. 1, L. 6, L. 16, Com. praed.; L. 5 De serv., L. 19 De usuf. et quem.; Poth. C. O. t. 13, n. 5, 6, 9, 10; 3 Toul. 62, 241-246, 426, 446; 5 P. Fr. 484 --; 1 Dom. Servitudes, s. 1, n. 3, 14; 2 Mal. 131-3; 7 Lo. 507 --; 2 Bous. 162 --; C. N. 686. [I. 497.]

546. Real servitudes are established either for the use of buildings or for that of lands.—Those of the former kind are called urban, whether the buildings to which they are due are situated in town or in the country.—Those of the second kind are called rural without regard to their situation.—Servitudes take their name from the property to which they are due, independently of the one which owes them.—ff. L. 1, L. 2, De serv. praed. rust.; L. 198, De verb. sig.; Poth. C. O. t. 13, n. 2 --; 2 P. Poul. 294; 2 Mal. 116 --; 7 Lo. 515 --; 3 Toul. 341; 2 Bous. 164; 5 P. Fr. 345 --, 485, 486; C. N. 687. [I. 499.]

547. Servitudes are either continuous or discontinuous.—Continuous servitudes are those the exercise of which may be continued without the actual intervention of man; such are water conduits, drains, rights of view and others similar.—Discontinuous servitudes are those which require the actual intervention of man for their exercise; such are the rights of way, of drawing water, of pasture and others similar.—ff. L. 14, De serv., L. 1 De aq. quotid. et aest.; 3 Toul. 413, 443; 2 Marc. 614; 5 P. Fr. 486, 7; 2 Bous. 165; 1 Dem. 377; 2 Mal. 120; 7 Lo. 515; C. N. 688. [I. 499.]

548. Servitudes are apparent or unapparent.—Apparent servitudes are those which are manifest by external signs, such as a door, a window, an aqueduct, a sewer or drain, and the like.—Unapparent servitudes are those which have no external sign, as for instance, the prohibition to build on a land or to build above a certain fixed height.—ff. L. 20, De serv. praed. urb.; 3 Toul. 443; 1 Dem. 327; 7 Lo. 512, 513; 5 P. Fr. 487; 7 Mal. 115-121; 2 Marc. 614; C. N. 689. [I. 499.]

SECTION II.

How servitudes are established.

549. No servitude can be

established without a title; possession even immemorial is insufficient for that purpose.—C. P. 186; C. O. t. 13, a. 225; Poth. C. O. t. 13, n. 19, Pres. n. 164, 286, 287; 2 Mal. 122; C. N. 690, 691. [I. 499.]

550. The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto.—3 Toul. 446, 7; 2 Bous. 170; 2 Mal. 127; 5 P. Fr. 491, 2; C. N. 695. [I. 499.]

551. As regards servitudes the destination made by the proprietor is equivalent to a title, but only when it is in writing, and the nature, the extent and the situation of the servitude are specified.—ff. L. 7 Com. praed; C. P. 215, 216; Ser. Inst. 145; Bour. Servitudes, s. 3; Poth. C. O. t. 13, a. 228 & *n.*; Lal. Servitudes, 170; 3 Toul. 449, 451, 466, 476; C. N. 692, 693. [I. 499.]

552. He who establishes a servitude is presumed to grant all that is necessary for its exercise.—Thus the right of drawing water from the well of another carries with it the right of way.—ff. L. 11, Com. praed; L. 10, De reg. jur.; 2 Mal. 127; 5 P. Fr. 494; C. N. 696. [I. 501.]

SECTION III.

Of the rights of the proprietor of the land to which the servitude is due.

553. He to whom a servitude is due has the right of making all the works necessary for its exercise and its preservation.—ff. L. 20, § 1, De serv. praed. urb.; L. 10, De ser. L. 15, De serv. praed. rust.; L. 11, com. praed.; Dom. l. 1, t. 12, s. 1, n. 7, s. 4, n. 1, 2, s. 5, n. 3; Lal. 60, 74, 300; 3 Toul. 240, 241, 500; 7 Lo. 535; 5 P. Fr. 499; 2 Mal. 128; C. N. 697. [I. 501.]

554. These works are made at his cost and not at that of the proprietor of the servient land, unless the title constituting the servitude establishes the contrary.—ff. L. 15, De serv.; L. 6, § 2, Si serv. vind.; Dom. l. c.; 1 Mal. 128; 5 P. Fr. 499 --; C. N. 698. [I. 501.]

555. Even in the case where the proprietor of the servient land, is charged by the title with making the necessary works, for the exercise and for the preservation of the servitude, he may always free himself from the charge by abandoning the servient immoveable, to the proprietor of the land to which the servitude is due.—ff. L. 23, § 2, De serv. praed. rust.; L. 12, com. praed; Cod. L. 3, De serv. et aq.; 1 Dom. Servitudes, s. 4, n. 6; Fav. Déguerpissement, Servitudes; 3 Toul. 150, 217, 220, 224, 226, 501, 510, 511; 2 Mal. 129; 7 Lo. 537 --; C. N. 699. [I. 501.]

556. If the land in favor of which a servitude has been established come to be divided, the servitude remains due for each portion, without however the condition of the servient land being rendered worse.—Thus in the case of a right of way, all the coproprietors have

a right to exercise it, but they are obliged to do so over the same portion of ground.—ff. L. 17, De serv.; L. 23, De serv. praed. rust; Dom. Des serv. s. 4, n. 7; 3 Toul. 494, 5; 2 Bous. 172; 7 Lo. 538, 9; 2 Mal. 130; 5 P. Fr. 502; C. N. 700. [I. 501.]

557. The proprietor of the servient land can do nothing which tends to diminish the use of the servitude or to render its exercise more inconvenient.—Thus he cannot change the condition of the premises, nor transfer the exercise of the right to a place different from that on which it was originally assigned.—However if by keeping to the place originally assigned, the servitude should become more onerous to the proprietor of the servient land, or if such proprietor be prevented thereby from making advantageous improvements, he may offer to the proprietor of the land to which it is due another place as convenient for the exercise of his rights, and the latter cannot refuse it.—ff. L. 9, Si serv. vind.; L. 20, § 3, L. 31, De serv. praed. urb.; Cod. L. 5, § 9, De serv.; Poth. C. O. t. 13, n. 7, Soc. n. 212; 5 P. Fr. 503; 2 Mal. 131; 2 Bous. 173; C. N. 701. [I. 501.]

558. On his part, he who has a right of servitude can only make use of it according to his title, without being able to make, either in the land which owes the servitude, or in that to which it is due, any change which aggravates the condition of the former.—ff. L. 20, § 5, De serv. praed. urb.; L. 24, L. 29, De serv. praed. rust.; L. 1, § 15, 16, De aq. cotid. et aest.; Dom. l. 1, t. 12, s. 1, n. 8; Poth. Soc. n. 236-7-9; 3 Toul. 490-2; 2 Mal. 132; 2 Bous. 175; 2 Marc. 630; C. N. 702. [I. 503.]

SECTION IV.

Of the extinction of servitudes.

559. A servitude ceases when the things subject thereto are in such a condition that it can no longer be exercised.—Poth. C. O. t. 13, n. 13; Dom. l. 1, t. 12, s. 6; 2 Marc. 630; 5 P. Fr. 507; C. N. 703. [I. 503.]

560. It revives if the things be restored in such a manner that it may be used again, even after the time of prescription.—ff. L. 34, L. 35, De serv. praed. rust.; L. 14, Quem. serv.; L. 19, Si serv. vind.; Dom. l. 1, t. 12, s. 6, n. 1; 8 Proud. Usufruit, n. 3698; 3 Toul. 522, 527, 531-3; 2 Bous. 174; 5 P. Fr. 507--; 2 Mal. 133-4; C. N. 704. [I. 503.]

561. Every servitude is extinguished, when the land to which it is due and that which owes it are united in the same person by right of ownership.—ff. L. 10, Com. praed.; L. 30, De serv. praed. urb.; Dom. l. 1, t. 12, s. 6; Poth. C. O. t. 13, n. 14, 16; C. O. a. 226; 3 Toul. 503; 2 Mal. 134; 7 Lo. 547; 5 P. Fr. 509; 2 Bous. 175; C. N. 705. [I. 503.]

562. Servitudes are extin-

guished by non-user during thirty years, between persons of full age and not privileged. —C. P. 186; Dom. l. 1, t. 12, s. 6, n. 5-8; Poth. C. O. t. 13, n. 17, 18; C. O. a. 226; Dom. Serv. s. 1, n. 13; Ser. Inst. 147; 2 Coch. 236,7; 3 Toul. 524; Merl. Servitudes, § 33, n. 11; C. N. 706. [I. 503.]

563. The thirty years commence to run for discontinuous servitudes from the day on which they cease to be used, and for continuous servitudes from the day on which any act is done preventing their exercise.—Dun. 295; Dom. Serv. s. 6, n. 5, 8; Ser. 144; Lam. t. 20, a. 10; Poth. C. O. t. 13, n. 18-20; 2 Bous. 177; 5 Mal. 135; 3 Toul. 527; C. N. 707; C. L. 786. [I. 503.]

564. The manner of exercising a servitude may be prescribed like the servitude itself and in the same way.—ff. L. 10, L. 14, L. 17, Quem. serv. amit.; 2 Mal. 137; 5 P. Fr. 514; 3 Toul. 486; C. N. 708; C. L. 792. [I. 503.]

565. If the land in favor of which the servitude is established belong to several persons by undivided shares, the enjoyment by one hinders the prescription with regard to the others.—ff. L. 5, L. 10, L. 16, Quem. serv. amit.; Dom. servitudes, s. 1, n. 19, 20; 5 P. Fr. 514; 2 Mal. 138-9; C. N. 709. [I. 503.]

566. If among the coproprietors there be one against whom prescription cannot run, such as a minor, he preserves the right for all the others.—ff. L. 10, Quem. serv. amit.; Poth. C. O. a. 226, *n.* 2; Dom. Servitudes, s. 1, n. 21; Ser. 145,6; 2 Bous. 178; 5 P. Fr. 515,6; 2 Mal. 138; C. N. 710. [I. 505.]

TITLE FIFTH.

OF EMPHYTEUSIS.

SECTION I.

General provisions.

567. Emphyteusis or emphyteutic lease is a contract by which the proprietor of an immoveable conveys it for a time to another, the lessee subjecting himself to make improvements, to pay the lessor an annual rent, and to such other charges as may be agreed upon.—Cod. L. 1, L. 2, L. 3, De ju. emph.; Dom. l. 1, t. 4, s. 10, n. 1; 6 Guy. Emphythéose, 680; A. D. Emphythéose, 296, n. 1; 7 N. D. Emphythéose, 338; 2 Arg. 300; 1 Fer. D. 784; Dun. 338; 2 Proud. D. P. n. 709; 1 Proud. Usufruit, n. 97, p. 98; Poth. B. R., 15, 5, 57. [I. 505.]

568. The duration of emphyteusis cannot exceed ninety-nine years and must be for more than nine.—C. S. L. C. c. 50, s. 1-3; 2 A. D. Emphythéose, 296; 7 N. D. c. v. n. 6, p. 538; 13 Id. 280; 1 Fer. D. 783; 1 Dom. 221; 1 Bour. p. (1); 2 Ency. 221; Poth. B. R. 45. [I. 505.]

569. Emphyteusis carries with it alienation; so long as it lasts, the lessee enjoys all the rights attached to the quality of a proprietor. He alone can constitute it who has the free disposal of his property.—Dom. l. 1, t. 4, s. 10, n. 5; 6 Guy. Emphytéose, 682; 2 A. D. c. v. n. 2, p. 296; 7 N. D. c. v. § 2, n. 6, p. 539; 13 Id. 280; 1 Fer. D. 784; 3 Delv. 185; Poth. 111. [I. 505.]

570. The lessee who is in the exercise of his rights, may alienate, transfer and hypothecate the immoveable so leased, without prejudice to the rights of the lessor; if he be not in the exercise of his rights, he can only do so with judicial authorization and formalities. —Dom. l. c. n. 6; Lac. 262; 2 Arg. 304; 6 Guy. 681,2; 1 Fer. D. 784; 7 N. D. 539, 543; 1 Dur. n. 76, 77, 78, 80; 2 Ency. 681,2; Fœl. H. Rentes foncières, 24.—[I. 505.]

571. Immoveables held under emphyteusis may be seized as real property, under execution against the lessee by his creditors, who may bring them to sale with the formalities of a sheriff's sale. —6 Guy. 682; 1 Fer. D. 785; 2 A. D. 297; 7 N. D. 542. [I. 505; III. 377.]

572. The lessee is entitled to bring a possessory action against all those who disturb him in his enjoyment and even against the lessor.—2 Proud. D. P. 325; 2 Ency. 456; Poth. n. 3. [I. 507.]

SECTION II.

Of the rights and obligations of the lessor and of the lessee.

573. The lessor is obliged to guarantee the lessee, and to secure him in the enjoyment of the immoveable leased, during the whole time legally agreed upon.—He is also obliged to resume such immoveable and to discharge the lessee from the rent or dues stipulated, in the case of the latter wishing to leave it, unless there is an agreement to the contrary.—Dom. l. c. n. 7; 6 Guy. 682, 3; 2 Fer. D. 786; 2 Arg. 300 --; 7 N. D. 542; 2 Ency. 455; Poth. 32, 121, 123 --. [I. 507.]

574. On his part the lessee is bound to pay annually the emphyteutic rent; if he allow three years to pass without doing so, he may be judicially declared to have forfeited the immoveable, although there be no stipulation on that subject. —Cod. L. 2, De ju. emph.; Car. l. 7, Rép. 39; Dom. l. c. n. 10; 1 Fer. D. 784; 7 N. D. 542; 13 N. D. 281; Poth. 1, 35, 40, 38. [I. 507.]

575. The rent is payable in the whole, without the lessee having a right to claim its remission or diminution, either on account of sterility or of

unavoidable accidents which may have destroyed the harvest or hindered the enjoyment, or even for a loss of a part of the land.—Cod. L. 1, De ju. emph.; Dom. l. c. n. 8; 1 Fer. D. 784; 6 Guy. 682; 7 N. D. 543; 2 Ency. n. 27, p. 456; Poth. 14-16. [I. 507.]

576. The lessee is held for all the real rights and land charges to which the property is subjected.—6 Guy. 682; Dom. l. c. s. 20; 7 N. D. 543; 2 Ency. 456; Poth. 66, also 110. [I. 507.]

577. He is bound to make the improvements which he has undertaken, as well as all greater or lesser repairs.—He may be forced to make them even before the expiration of the lease, if he neglect to do so, and the land suffer thereby any considerable deterioration.—Dom. l. c. s. 10, n. 9; 6 Guy. 682; 7 N. D. 544; 2 Ency. 457; Poth. 57, 58, 59 --. [I. 507.]

578. The lessee has not the right to deteriorate the immoveable leased; if he commit any waste which greatly diminishes its value, the lessor may have him expelled and condemned to restore the things to their former condition.—Dom. l. c.; Nov. 120, c. 8; 6 Guy. 682; 7 N. D. 543; Poth. 42 --. [I. 507.]

SECTION III.

Of the termination of emphyteusis,

579. Emphyteusis is not subject to tacit renewal.—It ends:

1. By the expiration of the time for which it was contracted, or after ninety-nine years, in case a longer term has been stipulated;

2. By forfeiture judicially pronounced for the causes set forth in articles 574 and 578, or for other legal causes;

3. By the total loss of the estate leased;

4. By abandonment.—Dom. l. c. n. 7; 6 N. D. Déguerpissement, § 2, n. 1 --; 7 Id. 542; 1 Duv. n. 181; Tr. Louage, n. 40; 2 Ency. Bail emph. n. 31 --; 2 De V. & Gil. Emphytéose, n. 37; Poth. 53, 121, 116, 114, 190. [I. 507.]

580. The lessee is only allowed to abandon if he have satisfied for the past all the obligations which result from the lease, and particularly if he have paid or tendered all arrears of the dues, and made the improvements agreed upon.—C. P. 109; 1 Lau. 327; Loy. l. c. & n. 13; 6 N. D. 128; 7 Id. 542; Poth. 147 --, 185 --. [I. 507.]

581. At the end of the lease, in whatever way it happens, the lessee must give up, in good condition, the property received from the lessor, as well as the buildings he obliged himself to construct, but he is not bound to repair those which he has erected without being obliged to do so.—L. & B. let. E. som. 22; 1 Fer. D. 783-6; 7 N. D. 543,4; 2 Ency. 457; Poth. 45, 43. [I. 507.]

582. As to improvements which the lessee has made voluntarily, without being bound to do so, the lessor has the option of either keeping

them, upon paying what they cost or their actual value, or permitting the lessee, if the latter can do so with advantage to himself and without deteriorating the land, to remove them at his own expense; otherwise, in each case, they belong, without indemnification, to the lessor, who may, nevertheless, compel the lessee to remove them, in conformity with the provisions of article 417.—2 Arg. 303-4; Fer. D. 786; 7 N. D. 544--; 1 Duv. n. 174; 2 De V. & Gil. 370; Poth. 41. [I. 507; III. 377.]

BOOK THIRD.

OF THE ACQUISITION AND EXERCISE OF RIGHTS OF PROPERTY.

GENERAL PROVISIONS.

583. Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise by the effect of law and of obligations.—Poth. Prop. n. 19--; 3 Marc. 1-3; 3 Boi. 4 --; C. N. 711, 712. [II. 255.]

584. Things which have no owner are held to belong to the crown.—Cod. De bon. vac. L. 1; ff. De adq. rer.; Inst. l. 2 t. 1, § 12; Dom. Dr. pub. l. 1, t. 6, s. 3, n. 1-4; 3 Desp. 150, n. 3; C. 401; 4 Toul. 6, 38, 51, 320; C. N. 713. [II. 255.]

585. There are things which have no owner and the use of which is common to all. The enjoyment of these is regulated by laws of public policy.—ff. L. 2, De div. rer.; Poth. Prop. n. 21, 22, 51, 60; 3 Toul. 22; 3 Marc. 5; C. N. 714. [II. 255.]

586. The ownership of a treasure rests with him who finds it in his own property; if he finds it in the property of another, it belongs half to him, and the other half to the owner of the property.—A treasure is any buried or hidden thing of which no one can prove himself owner, and which is discovered by chance.—ff. L. 31, § 1, De adq. rer.; Cod. L. un. De thesaur.; Inst. l. 2, t. 1, § 39; Dom. Dr. pub. l. 1, t. 6, s. 3, n. 7; 3 Desp. 144, s. 4; Poth. Prop. 64-66; Fen. Poth. on a. 716, p 186--; 3 Marc. 6, 7; C. N. 716. [II. 255.]

587. The right of hunting and fishing is governed by particular laws of public policy, subject to the legally acquired rights of individuals.—ff. L. 3, De adq. rer.; Inst. l. 2, t. 1, § 2 & 12; O. 1516, a. 89; O. 1681, l. 5, p. 356; O. 1669, t. 30, 31; C. S. C. c. 62; C. S. L. C. c. 29; Poth. Prop. n. 33, 47, 51, 52, 53, 56; 4 Merl. Chasse,

§ 2, p. 129 --; 3 Marc. 5; C. N. 715. [II. 255.]

588. Things which are the produce of the sea, or are drawn from its bottom, found floating on its waters, or cast upon its shores, and which never had an owner, belong, by right of occupancy, to the finder who has appropriated them.—Steph. bk. 4, p. 436, 525 --; O. M. l. 4, t. 9, a. 19, 20; C. N. 717. [II. 255.]

589. Things once possessed, which are afterwards found at sea, or on the sea shore, or their price, if they have been sold, continue to be the property of the original owner, if he claim them, and if he do not, they belong to the crown; save in all cases the claims of those who find and preserve them, for the salvage and preservation.—I. S. 17 & 18 V. c. 104; Steph. l. c.; O. M. l. 4, t. 9, a. 24, & Val. on same; C. N. 717. [II. 255.]

590. Whatever relates to wrecked ships and their cargo, the articles and fragments coming from them, the mode of disposing of them and of the price they bring, and the right of salvage, is specially regulated, according to the same principles, by the imperial statute, intituled: *The Merchant Shipping Act*, 1854. —I. S. 17 & 18 V. c. 104, s. 443-500; C. N. 717. [II. 257.]

591. The grass upon the beaches of the river St. Lawrence which are not private property, is, in certain places, granted by special laws or particular titles to the riparian proprietor, under the restrictions imposed by law or by regulations.—In other cases, if the crown have not otherwise disposed of it, it belongs by right of occupancy to him who cuts it.—C. S. L. C. c. 27, s. 1, 2. [II. 257.]

592. Things found in or upon the river St. Lawrence, or the navigable portion of its tributaries, or upon the banks thereof, must be advertised and disposed of in the manner provided by special provincial laws.—12 V. c. 114, s. 98, 99; 22 V. c. 12. [II. 257.]

593. Things found on the ground, on the public highways or elsewhere, even on the property of others, or which are otherwise without a known owner, are, in many cases, subject to special laws, as to the public notices to be given, the owner's right to claim them, the indemnification of the finder, their sale, and the appropriation of their price.—In the absence of such provisions, the owner who has not voluntarily abandoned them, may claim them in the ordinary manner, subject to the payment, when due, of an indemnity to the person who found and preserved them; if they be not claimed, they belong to such person by right of occupancy.—Unnavigable rivers are, for the purposes of this article, considered as places on land.—Dom. l. 1, t. 6, s. 3, n. 6; Poth. Prop. n. 67 --; C. N. 717. [II. 257.]

594. Among the things subject to the special provisions mentioned in the preceding article are:

1. Wood or other objects obstructing beaches and the adjoining lands;

2. Unclaimed goods in the hands of wharfingers, warehouse-keepers, and carriers either by land or by water;

3. Articles remaining in the post-office with dead letters;

4. Things suspected to have been stolen, remaining in the hands of officers of justice;

5. Animals found straying. —C. S. L. C. c. 66; c. 104; c. 26, s. 9, 10; c. 28, s. 2; C. S. C. c. 31, s. 29-31. [II. 257.]

595. Certain matters which come under the heading of the present book are incidentally treated in the books preceding. —[III. 377.]

TITLE FIRST.

OF SUCCESSIONS.

GENERAL PROVISIONS.

596. Succession is the transmission by law or by the will of man, to one or more persons, of the property and the transmissible rights and obligations of a deceased person.—In another acceptation the word "succession" means the universality of the things thus transmitted.—Poth. Suc. 2; 4 Toul. 63; 6 P. Fr. 7, 8; 1 Rog. 610. [II. 257.]

597. Abintestate succession is that which is established by law alone, and testamentary succession that which is derived from the will of man. The former takes place only in default of the latter.—Gifts in contemplation of death partake of the nature of testamentary successions. — The person to whom either of these successions devolves is called heir.—Poth. Suc. 1, 2; C. S. L. C. c. 34, s. 2; 1 Rog. 610; 11 Merl. 152 --; 6 P. Fr. 115 --; C. L. 875. [II. 257.]

598. Abintestate succession is subdivided into legitimate succession, which is conferred by law upon relatives, and irregular succession, when, in default of relatives, it devolves upon persons not related.—Poth. Suc. 1, 2; 6 P. Fr. 22; C. L. 873, 874; C. N. 756, 766. [II. 259.]

599. [The law, in regulating a succession, considers neither the origin nor the nature of the property composing it. The whole forms but one inheritance which is transmitted and divided according to uniform rules, or the dispositions made by the proprietor.]—6 P. Fr. 199 --; D. 161, 162, *n.* (c); C. S. L. C. c. 34, s. 2, § 1; C. N. 732. [II. 259.]

CHAPTER FIRST.

OF THE OPENING OF SUCCESSIONS AND OF THE SEIZIN OF HEIRS.

SECTION I.

Of the opening of successions.

600. The place where a succession devolves is determined by the domicile.—Cod. L. Un. Ubi. de her. ag.; 2 P. Fr. 408; 1 Toul. 321; 4 Id. 413; 1 Delv. 46; C. N. 110. [II. 259.]

601. Successions devolve by natural death, and also by civil death.—Poth. Suc. c. 3, § 1, Com. n. 502, Intr. n. 176, C. O. n. 36; C. P. 337; C. 36; Fen. Poth. 189; C. N. 718. [II. 259.]

602. Successions devolve by civil death from the moment it is incurred.—ff. L. 10, § 1, De pœn.; L. 6, De inj. rumpt. irr.; C. 37; Rog. 611; 1 Chab. Suc. 13, 14; C. N. 719. [II. 261.]

603. Where several persons, respectively called to the succession of each other, perish by one and the same accident, so that it is impossible to ascertain which of them died first, the presumption of survivorship is determined by circumstances, and, in their absence, by the considerations of age and sex, conformably to the rules contained in the following articles.—ff. L. 32, § 14, De don. int. vir. et ux.; De reb. dub.; Poth. Suc. c. 3, s. 1, § 1, C. O. t. 17, n. 38; Merl. Mort, § 2, a. 2; 6 P. Fr. 124--; 2 Mal. 167; C. N. 720. [II. 261.]

604. Where those who perished together were under fifteen years of age, the eldest is presumed to have survived;—If they were all above the age of sixty, the youngest is presumed to have survived;—If some were under the age of fifteen and others over that of sixty, the former are presumed to have survived;—If some were under fifteen or over sixty years of age, and the others in the intermediate age, the presumption of survivorship is in favor of the latter.—ff. L. 22, L. 23, De reb. dub.; 4 P. Poul. n. 43, p. 30; 1 Chab. Suc. on a. 722, p. 30--; C. N. 721. [II. 261.]

605. If those who perished together were all between the full ages of fifteen and sixty, and of the same sex, the order of nature is followed, according to which the youngest is presumed to survive;—But if they were of different sexes, the male is always presumed to have survived. — ff. l. c. 4 P. Poul. l. c.; 1 Chab. Suc. on a. 722; 2 Id. 32; 3 Marc. 15--; Rog. on a. 722; C. N. 722. [II. 261.]

SECTION II.

Of the seizin of heirs.

606. Abintestate successions pass to the lawful heirs in the order established by law; in default of such heirs, they devolve to the surviving consort, and if there be none, they fall to the crown.—ff. L. un. undè v. & ux.; Cod. c. t. L. 1, L. 4, de bon. vac.; Poth. Suc. c. 1, s. 2, a. 3, § 3; 1 Toul.

66; 2 Dem. 9; 6 P. Fr. 141, 2; C. N. 723. [II. 261.]

607. The lawful heirs, when they inherit, are seized by law alone of the property, rights and actions of the deceased, subject to the obligation of discharging all the liabilities of the succession; but the surviving consort and the crown require to be judicially put in possession, in the manner set forth in the Code of Civil Procedure.—C. P. 318; Poc. 195,6; 3 Lau. 80 --; Poth. Suc. c. 3, s. 2, Prop. n. 248, 261, 332, 336, Pos. n. 57, C. O. t. 17, n. 301; 4 Toul. 91, 97, 99, 258 --; 2 Dem. 9, n. 24; 6 P. Fr. 144--, p. 155, n. 85, p. 163; 2 Mal. 170; C. N. 724. [II. 261.]

CHAPTER SECOND.

OF THE QUALITIES REQUISITE TO INHERIT.

608. In order to inherit, it is necessary to be civilly in existence at the moment when the succession devolves; thus, the following are incapable of inheriting:

1. Persons who are not yet conceived;

2. Infants who are not viable when born;

3. Persons who are civilly dead.—ff. L. 6, L. 7, De su. et le. her.; C. P. 337; Poc. 197, 8; 4 P. Poul. 26 --; Poth. Suc. c. 1, s. 2, C. O. t. 17, n. 6, 8; Lam. t. 41, a. 3-5; 2 Mal. 173; 6 P. Fr. 165; D. 165; C. N. 725. [II. 263.]

609. Aliens may inherit in Lower Canada in the same manner as British subjects.—C. 25; C. S. C. c. 8, s. 9; Poth. Pers. 578, Suc. s. 2; 6 P. Fr. 180 --; C. N. 726. [II. 263.]

610. The following persons are unworthy of inheriting and, as such, are excluded from successions:

1. He who has been convicted of killing or attempting to kill the deceased;

2. He who has brought against the deceased a capital charge, adjudged to be calumnious;

3. The heir of full age, who, being cognizant of the murder of the deceased, has failed to give judicial information of it.—ff. L. 9, De ju. fisci; L. 7, § 4, De bon. damn.; L. 9, § 1, 2, De h. q. ut indig.; Poc. 197; Lac. Indignité, n. 1-5; Poth. Suc. c. 1, s. 2, a. 4, § 2, C. O. t. 17, n. 14; 6 P. Fr. 181 --; 2 Mal. 174; 1 Rog. 623, 4; Fen. Poth. 19, 194; 1 Chab. 69 --; C. N. 727. [II. 263.]

611. The failure to inform cannot however be set up against the ascendants or descendants, or the husband or wife of the murderer, nor against the brothers or sisters, uncles or aunts, nephews or nieces of the murderer, nor against persons allied to him in the same degrees.—Cod. L. 13, L. 17, De h. q. accus. non. poss.; 1 Hen. t. 4, c. 6, q. 101; Leb. Suc. t. 3, c. 9, n, 6; O. 1690, t. Des Plaintes; L. & B. let. C. c. 25, H. c. 5, S. c. 20; 1 Fur. 611 --; 6 P. Fr. 191-3-4; 2 Mal. 176; 1 Chab. 83; 2 Bous. 28; C. N. 728. [II. 263.]

612. Any heir who is excluded from the succession by reason of unworthiness is bound to restore all the fruits and

revenues that he has received since the succession devolved. —1 Fur. 598; 6 P. Fr. 193; 4 Toul. 117; 2 Mal. 177; 2 Bous. 20; C. N. 729. [II. 263.]

613. The children of an unworthy heir are not excluded from the succession by reason of the fault of their father, if they come to it in their own right and without the aid of representation, which in this case does not take place.—Lob. Suc. l. 3, c. 9, n. 6; Poth. Suc. c. 1, s. 2, a. 4, § 1, 2, c, 2, s. 1, a. 1, § 2; Lac. c. v. n. 6; Fen. Poth. 195; C. N. 730. [II. 263.]

CHAPTER THIRD.

OF THE DIFFERENT ORDERS OF SUCCESSION.

SECTION I.

General provisions.

614. Successions devolve to the children and descendants of the deceased, and to his ascendants and collateral relations, in the order and according to the rules hereinafter laid down.—ff. L. 7. De bon. damn.; Poth. Suc. 40, C. O. t. 17, n. 15; 2 P. Fr. 198; D. 161, n. b, c.; C. N. 731. [II. 265.]

615. Proximity of relationship is determined by the number of generations, each generation forming a degree. —ff. L. 10, § 10, De grad. et aff.; Poth. Mar. n. 123; Suc. c. 1, s. 2, a. 3; 4 Toul. 165; 6 P. Fr. 212 --; C. N. 735. [II. 265.]

616. The succession of degrees forms the line.—The succession of degrees between persons who descend one from the other is called the direct line; that between persons who do not descend the one from the other, but from a common ancestor, is called the collateral line.—The direct line is distinguished into the direct descending, and the direct ascending line.—The former connects the ancestor with his descendants; the latter connects the individual with his ancestors.—ff. L. 1, De grad. et aff.; Poth. Mar. n. 121, 2; Suc. c. 1, s. 2, a. 3; C. N. 736. [II. 265.]

617. In the direct line the degrees are computed to be as many as there are generations between the persons; thus the son is, with respect to the father, in the first degree, the grandson in the second, and reciprocally as to the father and grandfather in respect of the son and grandson.—ff. L. 10, § 9, l. c.; Poth. l. c.; 2 Mal. 183; C. N. 737. [II. 265.]

618. In the collateral line the degrees are reckoned by the generations from one relation up to and not including the common ancestor, and from the latter to the other relation. —Thus two brothers are in the second degree, uncle and nephew in the third, cousins-german in the fourth, and so on.—ff. L. 1, l. c.; Inst. De grad. et cog. § 7; Poth. Suc. c. 1, s. 2, a. 3; 4 Toul. 168; 6 P. Fr. 212; 2 Mal. 183; C. N. 738. [II. 265.]

SECTION II.

Of representation.

619. Representation is a

fiction of law, the effect of which is to put the representatives in the place, in the degree and in the rights of the person represented. — Nov. 18, c. 4; Poth. Suc. 40, C. O. t. 17, n. 17; 4 P. Poul. 26, 7; 2 Mal. 184; C. N. 739. [II. 265.]

620. Representation takes place without limit in the direct line descending; it is allowed whether the children of the deceased compete with the descendants of a predeceased child, or whether all the children of the deceased having died before him, the descendants of these children happen to be in equal or unequal degrees amongst themselves.—Cod. L. 3, De sui. et leg.; Inst. De hered. q. ab intest.; Nov. 118, 127, c. 1; C. P. 319; Lam. t. 41, a. 20; Poth. Suc. 41; 3 Lau. 82; 2 P. Fr. 220; C. N. 740. [II. 265.]

621. Representation does not take place in favor of ascendants; the nearest in each line excludes the more distant. —Nov. 118, c. 2; 4 P. Poul. 27, n. 36; Poth. Suc. 79; 1 B. d'Arg. 11; Lam. t. 41, a. 26; 4 Toul. 191; C. N. 741. [II. 267.]

622. In the collateral line representation is admitted only where nephews and nieces succeed to their uncle and aunt concurrently with the brother and sister of the deceased.—C. P. 320; Nov. 118, c. 4; Poc. 206; 1 Lau. on a. 320; Poth. Suc. 94, 101; 6 P. Fr. 233; 2 Mal. 185; C. N. 742. [II. 267.]

623. In all cases where representation is admitted, the partition is effected according to roots; if one root have several branches, the subdivision is also made according to roots in each branch, and the members of the same branch divide among themselves by heads.—Nov. 118, c. 1; C. P. 320, 321; 3 Lau. 87, 93; 1 Arg. 436; Poc. 206; Poth. Suc. 46; Guy. Successions, 575; Lam. t. 41, a. 23; 6 P. Fr. 240; 2 Mal. 186; C. N. 743. [II. 267.]

624. Living persons cannot be represented, but only those who are naturally or civilly dead.—A person may represent him whose succession he has renounced.—Nov. 118, c. 1; 4 P. Poul. n. 38; 1 Arg. 437; Poth. Suc. c. 2, s. 1, a. 1, C. O. t. 17, n. 18; Lam. t. 41, a. 25; 6 P. Fr. 243; 2 Mal. 187; C. N. 744. [II. 267.]

SECTION III.

Of successions devolving to descendants.

625. Children or their descendants succeed to their father and mother, grandfathers and grandmothers, or other ascendants, without distinction of sex or primogeniture, and whether they are the issue of the same or of different marriages.—They inherit in equal portions and by heads when they are all in the same degree and in their own right; they inherit by roots, when all, or some of them, come by representation. —Nov. 118, c. 1; C. P. 302; 3 Lau. 11, 12; Poth. Suc. c. 2, s. 1, a. 1, § 4; s. 3, § 1; C. N. 745. [II. 267.]

SECTION IV.

Of successions devolving to ascendants.

626. [If a person dying without issue, leave his father and mother and also brothers or sisters, or nephews or nieces in the first degree, the succession is divided into two equal portions, one of which devolves to the father and mother, who share it equally, and the other to the brothers and sisters, nephews and nieces of the deceased, according to the rules laid down in the following section.]—6 P. Fr.248-253; 2 Mal. 189; 2 Bous. 58; 2 Marc. 76, 7; C. L. 899; C. N. 748. [II. 269.]

627. [If, in the case of the preceding article, the father or mother had previously died, the share he or she would have received accrues to the survivor of them.]—6 P. Fr. 280; 2 Mal. 194, 5; 2 Bous. 59, 61; 2 Marc. 78; C. L. 900; C. N. 749. [II. 271.]

628. [If the deceased leave no issue nor brothers nor sisters, nephews nor nieces in the first degree, nor father nor mother, but only other ascendants, the latter succeed to him to the exclusion of all other collaterals.]—6 P. Fr. 249 --; 2 Mal. 189; C. L. 901; C. N. 746. [II. 271.]

629. In the case of the preceding article the succession is divided equally between the ascendants of the paternal line and those of the maternal line. —The ascendant nearest in degree takes the half accruing to his line to the exclusion of all others. — Ascendants in the same degree inherit by heads in their line.]—6 P. Fr. 249 --; 2 Mal. 189; 2 Marc. 77; 2 Bous. 55 --; C. L. 902; C. N. 746. [II. 271.]

630. Ascendants inherit, to the exclusion of all others, property given by them to their children or other descendants who die without issue, where the objects given are still in kind in the succession, and if they have been alienated, the price, if still due, accrues to such ascendants.—They also inherit the right which the donee may have had of resuming the property thus given.—ff. L. 6, De jur. dot.; Cod. L. 2, De bon. q. lib.; C. P. 313; C. O. 315; Lam. t. 41, a. 35; Poth. Suc. c. 2, s. 2; 3 Boi. 82 --; 1 Rog. 636; 3 Marc. 76; 2 Mal. 190 --; 4 Conf. du C. on a. 747, p. 29 --; 2 Bous. 57; 6 P. Fr. 259 --; C. L. 904; C. N. 747. [II. 271.]

SECTION V.

Of collateral successions.

631. [If the father and mother of a person dying without issue, or one of them, have survived him, his brothers and sisters, as well as his nephews and nieces in the first degree, are entitled to one half of the succession.]—6 P. Fr. 288; 4 Toul. 205 --; 2 Mal. 195 --; C. 626; C. L. 907; C. N. 751. [II. 273.]

632. [If both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree, of the deceased

succeed to him, to the exclusion of the ascendants and the other collaterals. They succeed either in their own right, or by representation as provided in the second section of this chapter.]—Nov. 118, c. 2; 127, c. 1; 4 Toul. 178, 200-218; 6 P. Fr. 282 --; C. N. 750. [II. 273.]

633. [The division of the half or of the whole of the succession coming to the brothers, sisters, nephews or nieces, according to the terms of the two preceding articles, is effected in equal portions among them, if they be all born of the same marriage; if they be the issue of different marriages, an equal division is made between the two lines paternal and maternal of the deceased, those of the whole blood sharing in each line, and those of the half blood sharing each in his own line only. If there be brothers and sisters, nephews and nieces on one side only, they inherit the whole of the succession to the exclusion of all the relations of the other line.]—6 P. Fr. 289; 2 Marc. 78, 79; 4 Toul. 216; Rog. 646; 2 Bous. 63; 3 Boi. 104; C. L. 909; C. N. 752. [II. 273.]

634. [If the deceased, having left no issue, nor father nor mother, nor brothers, nor sisters, nor nephews nor nieces, in the first degree, leave ascendants in one line only, the nearest of such ascendants takes one half of the succession, the other half of which devolves to the nearest collateral relation of the other line.—If, in the same case, there be no ascendant, the whole succession is divided into two equal portions, one of which devolves to the nearest collateral relation of the paternal line, and the other to the nearest of the maternal line.]—Among collaterals, saving the case of representation, the nearest excludes all the others; those who are in the same degree partake by heads.—6 P. Fr. 299; 4 Toul. 219; 2 Mal. 198; Rog. 647; 3 Marc. 80; C. L. 910; C. N. 753. [II. 273.]

635. Relations beyond the twelfth degree do not inherit.—In default of relations within the heritable degree in one line, the relations of the other line inherit the whole.—C. N. 755. [II. 273.]

SECTION VI.

Of irregular successions.

636. When the deceased leaves no relations within the heritable degree, his succession belongs to his surviving consort.—ff. L. un. undè v. et ux.; Cod. e. t.; 3 P. Poul. 310; Poth. C. O. t. 17, n. 35; Loy. Seign. c. 12, n. 104; 4 Toul. n. 283, 319; C. N. 767. [II. 275.]

637. In default of a surviving consort, the succession falls to the crown.—Cod. L. 1, L. 2, L. 3, L. 4, L. 5, De bon. vac.; C. P. 167; Poth. Suc. c. 6; Loy. Seign. c. 12, n. 101 --; 6 N. D. Deshérence, 323; C. 401; D. on a. 768; C. N. 768. [II. 275.]

638. In the case of the two preceding articles a statement of the property of the succession, coming to the surviving consort or to the crown, must

be made, at their diligence, by means of an inventory or other equivalent instrument, before they can claim to be authorized to take possession.—Poth. Suc. 229; 6 N. D. 319, 321; 4 Toul. p. 289, 32, 535; 1 Chab. Suc. 592; 2 Dem. 35, 36; C. N. 769. [II. 275.]

639. This possession must be demanded in the superior court of original jurisdiction of the district in which the succession opens, and the suit is prosecuted and adjudicated upon in the manner and according to the forms determined in the Code of Civil Procedure.—6 N. D. 323; C. 607; 4 Toul. 321 --; 1 Chab. 592; 2 Dem. 37; C. N. 770. [II. 275.]

640. Whenever the prescribed rules and formalities have not been complied with, the heirs, if any appear, may claim an indemnity, and even damages, according to circumstances, for the consequent losses incurred. — 1 Chab. 598 --; 2 Dem. 38; C. L. 927; C. N. 772. [II. 275.]

CHAPTER FOURTH.

OF ACCEPTANCE AND RENUNCIATION OF SUCCESSIONS.

SECTION I.

Of acceptance of successions.

641. No one is bound to accept a succession which has devolved to him.—Cod. L. 16, De ju. delib.; C. P. 316; Poth. Prop. n. 248, Suc. c. 3, s. 2; 2 Mal. 260; C. N. 775. [II. 275.]

642. A succession may be accepted purely and simply, or under benefit of inventory.—ff. L. 57, De adq. v. om. hered.; Cod. L. 22, De ju. delib.; Poth. Suc. c. 2, s. 3, C. O. t. 17, n. 44; 2 Mal. 259; C. N. 774, 788, 789, 793. [II. 275.]

643. A married woman cannot validly accept a succession without being authorized thereto by her husband, or judicially, according to the provisions of chapter six, of the title *Of Marriage*.—Successions which devolve to minors and interdicted persons cannot be validly accepted otherwise than in conformity with the provisions contained in the titles which treat respectively of minority and of majority.—C. 177, 178, 180, 301, 302; Poth. P. Mar. n. 33, Suc. c. 3, s. 3, a. 1, § 1, C. O. t. 17, n. 40; 6 P. Fr. 363; 2 Mal. 227; C. N. 776, 217, 461, 462, 463. [II. 275.]

644. The effect of acceptance reaches back to the day when the succession devolved. —ff. L. 138, L. 193, De reg. jur.; C. P. 318; Poth. Prop. n. 248; C. N. 777. [II. 277.]

645. Acceptance may be either express or tacit; it is express when a person assumes the title or quality of heir in an authentic or private act; it is tacit when the heir performs an act which necessarily implies his intention to accept, and which he would have no right to perform except in his capacity of heir.—ff. L. 20, L. 42, L. 78, L. 86, L. 88, De adq. v. om. hered.; Cod. L. 2, L. 10, De ju. delib.; C. P. 317; C. O.

334; Poth. Suc. c. 3, s. 3, a. 1; C. N. 778. [II. 277.]

646. Mere conservatory acts and those of supervision and provisional administration are not acts of acceptance, if the title and quality of heir have not been assumed.—ff. L. 20, L. 78, De adq. v. om. hered.; Leb. Suc. l. 3, c. 8, s. 2, n. 4; Poth. Suc. c. 3, s. 3, a. 1; Ser. 318; Merl. Héritier, s. 2, § 1, n. 3, 4, Accept. de succes. n. 2; 4 Toul, 348; C. N. 779. [II. 277.]

647. A gift, sale or transfer of his heritable rights made by a coheir, either to a stranger or to all or some of his coheirs, implies, on his part, an acceptance of the succession.—The same presumption results: 1. From the renunciation made, even gratuitously, by one heir in favor of one or more of his coheirs; 2. From the renunciation made in favor even of all the coheirs without distinction, if he receive the price of his renunciation.—ff. L. 24, De adq. v. om. hered.; L. 6, De reg. ju.; Poth. Vente, n. 530; Suc. c. 3, c. 5, s. 3, a. 1; 6 P. Fr. 378; 2 Mal. 228; C. N. 780. [II. 277.]

648. Where the person to whom a succession has devolved dies without having renounced or expressly or tacitly accepted it, his heirs may accept or reject it in his stead.—ff. L. 86, De adq. v. om. hered.; Cod. L. 3, L. 19, De ju. delib.; Poth. Suc. c. 3, s. 2, C. O. t. 17, n. 41, 64; 6 P. Fr. 379, 380; 2 Mal. 229; C. N. 781. [II. 277.]

649. [If such heirs do not agree to accept or to reject the succession, it is held to be accepted under benefit of inventory.]—Poth. Suc. 135; N. D. Adition d'héréd. § 4, Hérédité, § 10; 6 P. Fr. 380; 2 Mal. 229; 1 Chab. 75; 3 Marc. 149; 4 Conf. du C. a. 785, p. 57; C. N. 782. [II. 277.]

650. A person of full age cannot impugn his express or tacit acceptance of a succession, unless such acceptance has been the result of fraud, fear or violence; he can never disclaim it on the ground of lesion only, unless the succession has become absorbed or notably diminished by the discovery of a will which was unknown at the time of the acceptance.—ff. L. 22, De adq. v. om. hered; Cod. L. 4, De rep. vel abst.; Lac. 576; 16 Guy. 561, 2; 6 Poth. Com. n. 532, Suc. 138, 9; 3 Fur. 413; 6 P. Fr. 381; 2 Mal. 231; C. N. 783. [II. 277.]

SECTION II.

Of renunciation of successions.

651. Renunciation of a succession is not presumed; it is effected by a notarial deed, or by a judicial declaration which is recorded.—4 Fur. 52 --; Lac. 576; Poth. Suc. c. 3, s. 3, § 3, C. O. t. 17, n. 64, 5; Merl. Renonciation, § 1, n. 3; C. N. 784. [II. 279.]

652. An heir who renounces is deemed to have never been heir.—Poth. Suc. c. 3, s. 2, al. 9, 10, s. 4, § 4, Prop. n. 248, 261; C. N. 785. [II. 279.]

653. The share of a party renouncing accrues to his co-

heirs. If he be alone, the whole succession devolves to the next in degree.—ff. L. 13, De adq. v. om. hered.; L. 59, L. 63, L. 66, De hered. inst.; Cod. L. 4, De rep. vel abst. hered.; Poth. Suc. c. 3, s. 2, 4, § 4, Prop. n. 248, C. O. t. 17, n. 39, 67, Vente, n. 546; 6 P. Fr. 385 --; 4 Toul. 196; 2 Mal. 235; 3 Marc. 157 --; C. N. 786. [II. 279.]

654. No one can take as the representative of an heir who has renounced. If the party renouncing be the sole heir in his degree, or if all his coheirs have renounced, the children take in their own right and inherit by heads.—L. & B. let. R. c. 17; Che. cent. 1, q. 22; Lepr. cent. 1, c. 23; 2 Hen. l. 4, q. 4; 6 P. Fr. 392; C. N. 787. [II. 279.]

655. The creditors of an heir who renounces, to the prejudice of their rights, may procure the rescission of such renunciation, and afterwards accept the succession themselves, in right of their debtor, and in his place and stead.—In such case the renunciation is annulled only in favor of the creditors who have demanded the rescission, and merely to the extent of their claims. It is not annulled in favor of the heir who has renounced.—ff. L. 6, De h. q. in fraud.; Poth. Suc. c. 3, s. 3, a. 1, § 2, C. O. t. 17, n. 4; 6 P. Fr. 394; C. N. 788. [II. 279.]

656. An heir is never too late to renounce the succession, as long as he has not formally or tacitly accepted it.—Poth. Suc. 163, Com. n. 534, 544, 556, Intr. t. 10, n. 93; Lac. 577; 2 Mal. 238; C. N. 789. [II. 279.]

657. An heir who has renounced a succession may nevertheless resume it, so long as it has not been accepted by another having a right to it; but he resumes it in the state in which it then is, and without prejudice to the rights which third parties have acquired upon the property of such succession, by prescription or by acts validly made while it was vacant.—Leb. Suc. c. 3, s. 3, a. 1, p. 136; C. 302; 2 Mal. 238; 6 P. Fr. 397; Poth. Suc. 136; C. N. 790. [II. 279.]

658. No one can renounce the succession of a living person, or alienate the contingent rights he may claim therein, unless it is by contract of marriage.—Lac. 570 --; Poth. Suc. c. 1, s. 2, a. 4, § 2, 3; c. 3, s. 3, a. 1, § 2; 2 Mal. 238; 2 Bous. 116 --; 3 Marc. 167; C. 1061; C. N. 791. [II. 281.]

659. Any heir who has abstracted or concealed property belonging to a succession forfeits the right of renouncing it; notwithstanding his subsequent renunciation he remains unconditional heir, without right to claim any share in the property abstracted or concealed.—ff. L. 71, § 4, De adq. v. om. hered.; Poth. Suc. c. 3, a. 2, § 3, Com. n. 690, C. O. t. 10, n. 7, on a. 204; Merl. Recélé, n. 2; C. N. 792. [II. 281.]

SECTION III.

Of the formalities of acceptance, of benefit of inventory and its effects, and of the obligations of the beneficiary heir.

660. In order to obtain benefit of inventory the heir is bound to demand it by a petition to the court or to one of the judges of the court of superior original jurisdiction of the district in which the succession devolved; this petition is proceeded and adjudicated upon in the manner and form required by the Code of Civil Procedure.—Ser.314; Rod. O.1667, p. 95; 2 Ed. & O.104; 2 Beaub. 43; C. N. 793. [II. 281.]

661. [The judgment granting the petition must be registered in the registry office of the division in which the succession devolved.] — [II. 281.]

662. Such demand must be preceded or followed by the making of a faithful and exact inventory of the property of the succession, before notaries, in the form and within the delays established by the rules of procedure.—Ser. 314; Rod. 95; Poth. Suc. 143, C. O. t. 17, n. 48; 1 A. D. 305 --; C. N. 794. [II. 281.]

663. The beneficiary heir is also bound, if the majority of the creditors or other persons interested require it, to give good and sufficient security for the value of the moveable property comprised in the inventory, and for whatever moneys, arising from the sale of immoveables, he may then or thereafter have in his hands. —In default of such security, the court may, according to circumstances, adjudge the heir to have forfeited the benefit of inventory, or order that the moveables be sold and that the proceeds, as well as the other moneys of the succession which he may have in hand, be deposited in court, to be applied in discharging the liabilities of the succession.—Poth. C. O. t. 17, n. 48; Lam. 246; 2 Bous. 144 --; 2 Mal. 251; C. N. 807. [II. 281.]

664. The heir is allowed three months to make the inventory, counting from the time when the succession devolved. —He has moreover, in order to deliberate upon his acceptance or renunciation, a delay of forty days, which begin to run from the day of the expiration of the three months for the inventory, or from the day of the closing of the inventory, if it be completed within the three months. —ff. L. 1, L. 2, L. 3, L. 4, De ju. delib.; Cod. L. 22, § 2, 3, De ju. delib.; O. 1667, t. 7, a. 1-5; Poth. Suc. c. 3, s. 5, C. O. t. 17, n. 68; 6 P. Fr. 413; C. N. 796. [II. 281.]

665. If however there be in the succession articles of a perishable nature, or of which the preservation is costly, the heir may cause them to be sold, without thereby incurring the presumption of having accepted; but such sale must be made publicly, and after the notices and publications required by the rules of procedure.—ff. L. 5, L. 6, De jur. delib; L. 20, De adq. v. om.

hered.; Poth. Suc. c. 3, s. 3, a. 2, § 5; C. N. 796. [II. 283.]

666. During the delays for making the inventory and deliberating, the heir cannot be compelled to assume the quality, nor can any sentence be obtained against him; if he renounce at or before the expiration of the delays, the lawful costs he has incurred up to that time are chargeable to the succession. — ff. L. 22, § 1, De ju. delib.; Poth. Suc. c. 3, s. 5, C. O. t. 17, n. 68; C. N. 797. [II. 283.]

667. After the expiration of the above delays, the heir may, in case an action is brought against him, demand a further delay, which the court seized of the case may grant or refuse, according to circumstances.—ff. L. 3, De jur. delib.; O. 1667, t. 7, a. 4; Poth. Suc. c. 3, s. 5, C. O. t. 17, n. 70; C. N. 798. [II. 283.]

668. Costs of suit, in the case of the preceding article, are chargeable to the succession, if the heir prove that he had no knowledge of the death, or that the delays were insufficient, whether by reason of the situation of the property or of the contestations which have arisen; if he make no such proof, he remains personally liable for the costs.—Poth. l. c.; 4 Toul. 353, 380; C. N. 799. [II. 283.]

669. The heir, nevertheless, after the expiration of the delays granted by article 664, and even of that given by the judge under article 667, still retains the power of making an inventory and of becoming beneficiary heir, if he have not otherwise performed any act of heirship, or if he have not been condemned, in his quality of unconditional heir, by a judgment which has become final.—ff. L. 10, De ju. delib.; Cod. L. 19, c. t.; Poth. Suc. c. 3, s. 3, a. 1, 2, C. O. t. 17, n. 46, 70; Merl. Héritier, s. 2, 3, § 2, Suc. s. 1, § 5 n. 4; 6 P. Fr. 419 --; 2 Mal. 284 --; C. N. 800. [II. 283.]

670. An heir who is guilty of concealment, or who knowingly or fraudulently has omitted to include in the inventory any effects of the succession, forfeits the benefit of inventory.—Cod. L. 22, § 10, 12, De ju. delib; Nov. 1, c. 2, § 2; Lap. let. H, n. 3; Poth. Suc. c. 3, s. 3, a. 2, § 3; Fur. Testaments, c. 3, s. 6, n. 189; 6 P. Fr. 287; C. N. 801. [II. 283.]

671. The effect of benefit of inventory is to give the heir the advantage:

1. Of being liable for the debts of the succession only to the extent of the value of the property he has received from it;

2. Of not confounding his private property with that of the succession, and of retaining against the succession the right of demanding payment of his own claims.—ff. L. 22, De ju. delib.; Poth. Com. n. 739, Ob. 642, Suc. c. 3, s. 3, a. 2, § 1, 7, 8, C. O. t. 17, n. 49, 52; Merl. Bénéfice d'inventaire, n. 15; 6 P. Fr. 287; C. N. 802. [II. 283.]

672. The beneficiary heir is charged to administer the property of the succession, and

must render an account of his administration to the creditors and legatees. He cannot be compelled to pay out of his private property unless he has been put in default to produce his account and has failed to fulfil this obligation. — After the verification of the account he cannot be compelled to pay out of his private property except to the extent of the sums remaining in his hands. —Leb. Suc. l. 3, c. 4, § 85; Poth. Suc. c. 3, s. 3, a. 2 § 4, 6, C. O. t. 17, n. 49, 54; 6 P. Fr. 425; 2 Mal. 249; C. N. 803. [II. 283.]

673. In his administration of the property of the succession the beneficiary heir is bound to exercise all the care of a prudent administrator.—Leb. Suc. l. 3, c. 5, n. 85; Fer. G. C. on a. 342, gl. 1, § 2, n. 24; Poth. Suc. t. 3, c. 3, a. 2, § 4; C. 1064, 1070; 6 P. Fr. 429; C. N. 804. [II. 285.]

674. If the beneficiary heir cause the moveables of the succession to be sold, the sale must be made publicly and after the notices and publications required by the rules of procedure.—If he produce them in kind, he is liable only for the depreciation or the deterioration caused by his negligence. —C. P. 344; Poth. Suc. c. 3, s. 3, a. 2, § 5, C. O. t. 17, *n.* 1, on a. 342; 2 Bous. 142; 2 Mal. 250; C. N. 805. [II. 285.]

675. With regard to the immoveables, if it become necessary to sell them, the sale and the distribution of the price arising from it, are proceeded with in the manner and form followed with respect to the property of vacant successions, according to the rules laid down in the following section.—Cod. L. 22, § 4, 5, 6, De jur. delib.; Poth. Suc. l. c., C. O. a. 343; C. S. L. C. 88, s. 10; C. 371-3; Merl. Bénéfice d'inventaire, n. 9 bis; 4 Toul. 385; 2 Mal. 29; 6 P. Fr. 431; C. N. 806. [II. 285.]

676. The beneficiary heir, before disposing of the property of the succession, and after having made the inventory, gives notice of his quality in the manner established in the Code of Civil Procedure.—After two months from the giving of the first notice, if there be no actions, seizures or judicial contestations, by or between the creditors or legatees, the beneficiary heir may pay the creditors and legatees as they present themselves.—If there be actions, seizures or contestations of which he has received judicial notice, he can only pay according to the directions of the court.—Poth. Suc. c. 3, s. 3, a. 2, § 6, C. O. t. 17, n. 50; C. N. 808. [II. 285.]

677. The beneficiary heir may at all times:

1. Renounce the benefit of inventory, either judicially or by a notarial deed, to become unconditional heir, upon giving the same notices as when he accepted;

2. Render a final account in court, upon giving the same notices as when he accepted, and any other notices the court may direct, in order to be freed from his administration, whether he has legally

paid, by order of the court or extra-judicially, all the debts of the succession, or whether he has duly paid them to the extent of the full value he has received.—By means of the discharge obtained from the court he may retain in kind any property remaining in his hands which forms part of the succession. —Extension of preced. art.; C. N. 808. [II. 285.]

678. The beneficiary heir may likewise, with the consent of all parties interested, render an amicable account without judicial formalities. — Poth. Suc. c. 3, s. 4, a. 2; Lam. t. 43, a. 13. [II. 287.]

679. If the discharge be based upon the payment by the beneficiary heir of all the debts, without, however, his having paid out to the extent of what he received, he is not liberated as regards creditors who present themselves within three years from the discharge, and shew satisfactory cause for not having come forward within the required delays, but he is bound to satisfy them so long as he has not paid out the full value of what he received.—Poth. Suc. 146; C. N. 809. [II. 287.]

680. The discharge of the beneficiary heir does not prejudice the claim of the unpaid creditors against the legatee who has received to their detriment, unless the latter proves that they might have been paid by using due diligence, without his being left answerable towards other creditors who received in lieu of the claimant,—Poth. Suc. 146, C. O. t. 17, n. 51; C. N. 809. [II. 287.]

681. The expenses of seals, if any have been affixed, of the inventory, and of the account, are chargeable to the succession. —Cod. L. 22, § 4-6, De jur. delib.; Poth. Suc. c. 3, s. 3, a. 2, § 6, C. O. t. 17, n. 50; C. N. 810. [II. 287.]

682. The form and contents of the account which the beneficiary heir must render are regulated by the Code of Civil Procedure.—Poth. Suc. 146; C. 308. [II. 287.]

683. [In the collateral as well as in the direct line, the heir who accepts under benefit of inventory is not excluded by the one who offers to accept unconditionally.]—C. P. 342, 343; 3 Lau. 186, 7; Poth. Suc. 152; Lam. t. 43, a, 14, 15; N. D. Héritier bénéficiaire, § 2. [II. 287.]

SECTION IV.

Of vacant successions.

684. After the expiration of the delays for making the inventory and for deliberating, if no one come forward to claim a succession, if there be no known heirs, or if the known heirs have renounced, such succession is deemed vacant. —Poth. Suc. 248, C. O. t. 17, n. 1; Guy. Curateur, 197; Merl. Curateur, § 3, n. 1; 6 P. Fr. 438; 2 Mal. 209; C. N. 811. [II. 287.]

685. Upon the demand of any party interested, a curator to such succession is named by the court or by one of the

judges of the court of original jurisdiction of the district in which it devolves.— This appointment is made in the manner and form prescribed by the Code of Civil Procedure.—ff. L. 1, L. 2, De cur.; Guy. Curateur, 197; Merl. Héritier, § 2, s. 2; 6 P. Fr. 438; 2 Mal. 254; C. N. 812. [II. 287.]

686. Such curator gives notice of his quality, is sworn, and forthwith proceeds to the making of the inventory; he administers the property of the succession, exercises and prosecutes all the rights pertaining to it, answers all claims brought against it, and renders an account of his administration.—ff. L. 2, § 1, De cur.; Guy. l. c.; Merl. l. c.; 4 Toul. 311-3; 2 Bous. 150-2; C. N. 813. [II. 289.]

687. After the appointment of the curator, if an heir or legatee appear who lays claim to the succession, he may cause the curatorship to be set aside for the future, and, upon proof of his rights, may obtain possession, by means of an action brought before the proper tribunal.—Dorion & Denechaud, n. 857, Quebec, 20 Feb. 1832. [II. 289.]

688. The provisions of the third section of this chapter as to the form of the inventory, the notices to be given, the mode of administration, and the accounts to be rendered by beneficiary heirs, apply to curators of vacant successions. —4 Toul. 400; 2 Delv. 36; 2 Bous. 151; C. N. 814. [II. 289.]

CHAPTER FIFTH.

OF PARTITION AND RETURNS.

SECTION I.

Of the action of partition and its form

689. No one can be compelled to remain in undivided ownership; a partition may always be demanded notwithstanding any prohibition or agreement to the contrary.— It may however be agreed or ordered that the partition shall be deferred during a limited time, if there be any reason of utility which justifies the delay.—ff. L. 24, Com. divid.; Cod. L. 5, c. t.; Poth. Suc. 168, Com. n. 694, 697, 698, Société, n. 162-3-6, 197, C. O. t. 17 n. 71,2; Merl. Partage, § 1, n. 2, 3; C. N. 815. [II. 289.]

690. Partition may be demanded even though one of the coheirs enjoys separately a part of the property of the succession, if there have been no act of partition, nor a sufficient possession to acquire prescription.—Cod. L. 21, De pac.; L. 4, Com. divid.; Poth. Soc. n. 166, Com. n. 698; Suc. 169, C. O. t. 17, n. 72; Merl. Prescription, s. 3, § 3, a. 1, n. 3; 2 Mal. 257; 7 P. Fr. 53 --; C. N. 816. [II. 289.]

691. Neither the tutor of a minor, nor the curator of an interdicted person or of an absentee, can demand the partition of the immoveables of a succession which has devolved to such minor, interdicted person or absentee, but he may be compelled to join in it, and in such case the partition is ef-

fected judicially, and with the formalities required for the alienation of the property of minors.—The tutor or curator may however demand the final partition of the moveables, and the provisional division of the immoveables of the succession. —Poth. Suc. c. 4, a. 1, § 2, Com. n. 695,6, Pers. 6, s. 4, a. 3, Soc. n. 164; C. 90, 91, 305; C. N. 817. [II. 289.]

692. A husband may, without the concurrence of his wife, demand the partition of the moveables or immoveables which have accrued to her and have fallen into the community. As to things which are excluded from it, the husband cannot demand their partition without the concurrence of his wife; he may however, if he have a right to enjoy her property, demand a provisional division.—The coheirs of the wife cannot demand a definitive partition without suing both husband and wife.—Poth. P. Mar. n. 83, 84, C. O. t. 17, n. 154, Suc. c. 4, a. 1, § 2; 7 P. Fr. 63 --; C. N. 818. [II. 289.]

693. If all the heirs be of full age, be present, and agree, the partition may be effected in such form and by such act as the parties interested deem proper.—If any of the heirs be absent or unwilling, if there be among them minors or interdicted persons, in all such cases the partition can only be effected judicially, and the rules laid down in the succeeding articles are to be followed.—If there be several minors represented by one tutor and having adverse interests, a special and separate tutor must be given to each, to represent him in the partition.—Poth. Suc. c. 4, a. 4; 7 P. Fr. 163; 2 Mal. 268; C. N. 819, 838. [II. 291.]

694. The action of partition and the contestations which arise in it are submitted to the court of the place where the succession devolves, if it devolve in Lower Canada; if not, to the court of the place where the property is situate, or of the domicile of the defendant.—It is before this tribunal that licitations and the proceedings connected with them are to be effected.—7 P. Fr. 96; 2 Mal. 261; C. S. L. C. c. 82, s. 27; C. N. 822. [II. 291.]

695. In the action of partition and its incidents the same proceedings are had as in ordinary suits, saving any modifications introduced by the Code of Civil Procedure.—Poth. Suc. c. 4, a. 4; C. N. 823. [II. 291.]

696. The valuation of immoveables is made by experts who are chosen by the parties interested, or who, upon the refusal of such parties, are officially appointed.—The report of the experts must declare the grounds of the valuation, it must indicate whether the thing estimated can be conveniently divided, and in what manner, and must determine, in case of division, each of the portions which may be made of it, and the value of such portion.—Poth. Vente, n. 516, Société, n. 168, Suc. c. 4, s. 4, C. O. 17, n. 75; C. N. 824. [II. 291.]

697. Each of the coheirs

may demand his share in kind of the moveable and immoveable property of the succession; nevertheless, if there be seizing or opposing creditors, or if the majority of the coheirs deem a sale necessary to discharge the liabilities of the succession, the moveable property is publicly sold in the ordinary manner. — ff. L. 26, L. 28, Fam. ercisc.; Poth. com. n. 700, Soc. n. 168, Suc. c. 4, a. 4; 2 Toul. 371; C. N. 826. [II. 291.]

698. If the immoveables cannot conveniently be divided they must be sold by licitation before the court.—Nevertheless the parties, if they be all of full age, may consent to the licitation being made before a notary upon the choice of whom they agree.—ff. L. 20, L. 30, L. 55, Fam. ercisc.; Cod. L. 3, Com. divid.; Poth. Com. n. 707,8, 710, Vente, 516, Mar. 586, Soc. 171, Suc. c. 4, a. 4; 7 P. Fr. 111--; C. N. 827. [II. 291.]

699. After the moveable and immoveable property have been estimated, and sold if there be cause for it, the court may send the parties before a notary upon whom they have agreed, or who has been officially named if they do not agree in their choice.— They are to proceed, before such notary, to the account to which they are bound towards one another, to the formation of the general mass, the composition of the shares and the fixing of the compensation to be furnished to each of the copartitioners. — Poth. Soc. n. 167, 168, 170, Suc. c. 4, a. 1, § 3, p. 204, & a. 4, C. O. t. 17, n. 174; 7 P. Fr. 135--; C. N. 828. [II. 291.]

700. Each coheir returns into the mass, according to the rules hereinafter laid down, the gifts made to him and the sums in which he is indebted. —Poth. Suc. c. 4, a. 1, § 3, a. 4, C. O. 17, n. 76; 7 P. Fr. 137, 8; C. N. 829. [II. 293.]

701. If the return be not made in kind, the coheirs entitled to it pretake an equal portion from the mass of the succession.—These pretakings are made as much as possible in objects of the same nature and quality as those which are not returned in kind.—Poth. Suc. c. 4, a. 2, § 8, C. O. t. 17, n. 94; 4 Toul. 422; 2 Mal. 266; 7 P. Fr. 138-140; C. N. 830. [II. 293.]

702. After these pretakings, the parties are to proceed to the formation, out of what remains in the mass, of as many shares as there are partitioning heirs or roots.— Poth. Suc. c. 4, a. 4; 2 Mal. 266; 7 P. Fr. 140--; C. N. 831. [II. 293.]

703. In the formation and composition of the shares, the separation of immoveables into small parcels and the division of industrial establishments is to be avoided as much as possible; it is also proper to put into each share, if possible, the same quantity of moveables, immoveables, rights and credits, of the same nature and value.—ff. L. 55, Fam. ercisc.; Cod. L. 7, L. 21, Com. divid.; L. 11, Com. utri.; Poth. Com. n. 701, Suc. c. 4, a. 4, C. O. t.

17, n. 97; 4 Toul. 426; 2 Mal. 267; 7 P. Fr. 141 --; C. N. 832. [II. 293.]

704. The inequality of shares in kind, when it is unavoidable, is to be compensated by payment of the difference either in rent or in money.—ff. L. 55, Fam. ercisc.; Inst. De off. jud. § 4; Poth. Com. n. 701, al. 5, Suc. n. 170, al. 2, Suc. c. 4, a. 4, al. 17, a. 5, § 2, al. 1-3, C. O. t. 17, n. 97; 4 Toul. 426; 7 P. Fr. 148; C. N. 833. [II. 293.]

705. The shares are to be formed by one of the coheirs, if they can agree amongst themselves in the choice, and if he who is chosen accept the office; in the opposite case the shares are to be formed by an expert appointed by the court, and are afterwards to be drawn by lot.—Leb. Suc. l. 4, c. 1, n. 42; 1 Desp. Suc. pt. 1, s. 4, dist. 3, n. 8; Ren. C. P. t. Suc.; Poth. Suc. c. 4, a. 4, al. 5, 19, 20; 2 Mal. 267; 7 P. Fr. 154; C. N. 834. [II. 293.]

706. Before proceeding to draw, each copartitioner is allowed to propose his objections as to the formation of the shares.—4 Toul. 423; 7 P. Fr. 159; C. N. 835. [II. 293.]

707. The rules laid down for the division of the masses to be apportioned are also to be observed in the subdivisions of the partitioning roots.—Poth. Suc. c. 4, a. 1, § 1; 2 Delv. 48; 2 Mal. 268; 7 P. Fr. 159, 160; C. N. 836. [II. 293.]

708. If in the operations referred to a notary, contestations arise, he must draw up a statement of the difficulties and of the respective allegations of the parties, and submit them for the decision of the court that appointed him. These incidents are proceeded upon according to the forms prescribed by the laws of procedure.—4 Toul. 422; 2 Delv. 49; 7 P. Fr. 161; C. N. 837. [II. 295.]

709. Where licitation takes place by reason of there being amongst the heirs absentees, interdicted persons, or minors, even emancipated, it can only be effected judicially, and with the formalities prescribed for the alienation of the property of minors.—Poth. Suc. c. 4, a. 4; C. 300, 689, 691, 1563; 2 Delvincourt, 47; P. Fr. 166; C. N. 460, 819, 839. [II. 295.]

710. Every person, even a relation, who is not entitled to succeed to the deceased, and to whom one of the coheirs has assigned his right in the succession, may be excluded from the partition, either by all the coheirs or by one of them, on being reimbursed the price of such assignment.—Cod. L. 22, L. 23, Mand. v. cont.; Leb. Suc. l. 4, c. 2, s. 3, n. 66; Merl. Droits Suc. n. 8-9 bis, 11 & 12; 2 Mal. 271; 2 Chab. Suc. 319; 2 Bous. 181; 7 P. Fr. 170; C. N. 841. [II. 295.]

711. After the partition, each of the parties has a right to be put in possession of the titles belonging to the objects which have fallen to him.—The titles to a divided property remain with him who has the greatest share in it, subject to the obligation of giving the

use of them, when required, to the copartitioners interested therein.—The titles common to the whole inheritance are delivered to him whom the heirs have chosen to be the depositary of them; subject to the obligation of giving the use of them to the other copartitioners whenever required. If they disagree in the choice, it is made by the judge.—ff. L. 4, L. 5, L. 6, Fam. ercisc.; L. ult. De fi. inst.; Cod. L. 5, Com. utri.; Leb. Suc. l. 4, c. 1, n. 44, 45; Poth. Suc. c. 2, s. 1, a. 2, § 4; 2 Mal. 273; 7 P. Fr. 176; 4 Toul. 424, 430; 2 Bous. 183; C. N. 842. [II. 295.]

SECTION II.

Of returns.

712. [Every heir, even the beneficiary heir, coming to a succession, must return to the general mass all that he has received from the deceased by gift *inter vivos*, directly or indirectly; he cannot retain the gifts made nor claim the legacies bequeathed by the deceased, unless such gifts and legacies have been given him expressly by preference and beyond his share, or with an exemption from return.]—ff. L. 1, De coll. bon.; Cod. L. 17, L. 20, De coll.; C. P. 301-304; Leb. Suc. l. 3, c. 6, s. 1; Poth. Suc. c. 3, s. 3. a. 1, § 4; c. 4, a. 2, 65, C. O. t. 17. n. 56, 76, 77; Merl. Rap. à Suc. § 3, a. 4, n. 8; § 4, a. 2, n. 11; 7 P. Fr. 224; C. N. 843. [II. 297.]

713. The heir may nevertheless, by renouncing the succession, retain the gifts or claim the legacies made to him.—Cod. L. 17, L. 20, De coll.; L. 25. Fam. ercisc.; Nov. 92, c. 1; C. P. 307; 3 Lau. 24; O. 1731. a. 34; Poth. Suc. c. 4, a. 2, § 1, C. O. t. 17, n. 76; 2 Mal. 275; 7 P. Fr. 235; C. N. 845. [II. 297.]

714. [A donee who at the time of the gift was not an heir, but who at the time when the succession devolves is entitled to succeed, is bound to return the gift, unless the testator has exempted him from doing so.—Poth. Suc. c. 4, a. 3, § 2; 2 Mal. 276; 7 P. Fr. 238; C. N. 846. [II. 297.]

715. Gifts and legacies made to the son of a person who, at the time when the succession devolves has become entitled to succeed, are subject to be returned.—The father coming to the succession of the donor or testator is bound to return them.—ff. L. 6. De coll.; C. P. 306; 3 Lau. 23; C. O. 308; Leb. Suc. l. 3, c. 6, s. 2, n. 45; Poth. Suc. c. 4, a. 2, § 4; a. 3, § 2; 1 Arg 490; Lam. Arr. t. 44, a. 4; Poc. 490; P. Fr. 240, 241; 2 Mal. on a. 847; C. N. 847. [II. 297.]

716. A grandson coming to the succession of his grandfather is bound to return what has been given to his father, although he should renounce the succession of the latter.—Cod. L. 19, De coll.; C. P. 308; Leb. l. 3, c. 6, s. 2, n. 46; Poc. r. 12, p. 268; 1 Arg. 491; Lam. t. 44, a 7; C. N. 848. [II. 297.]

717. The obligation to return the gifts and legacies made during the marriage,

either to the consort who is entitled to succeed, or to the other consort alone, or to both, depends upon the interest of the heir who is capable of succeeding and the advantage he derives therefrom, according to the rules laid down in the title concerning marriage covenants, as to the effect of gifts and legacies made to the consorts during marriage.—Poth. Suc. c. 4. a. 2, § 4, al. 6-13; a. 3, § 2, al. 24; Merl. Rapport à Suc. § 6, n. 4; 7 P. Fr. 248 --; 2 Mal. 278; C. N. 849. [II. 297.]

718. Return is only made to the succession of the donor or testator. — Leb. pt. 2, p. 130; Poth. Suc. c. 4, a. 2, § 4, al. 6-13, C. O. t. 17, n. 84; 2 Mal. 279; 7 P. Fr. 254; C. N. 850. [II. 297.]

719. Whatever has been laid out for the establishment of one of the coheirs, or for the payment of his debts must be returned.—Cod. L. 20, De coll.; Bar. ad L. 1, § 15, De coll. n. 4-6; Loy. Offices, c. 6, n. 25, 26, 56, 58; Lac. Rapport, s. 3, n. 10; Poth. Suc. 180; Lam. t. 44, a. 13-17; 2 Mal. 279; 7 P. Fr. 256 --; 4 Conf. du C. 88; Chau. Obs. Coll. 213; C. N. 851. [II. 299.]

720. The expenses of nourishment, maintenance, education and apprenticeship, the ordinary expenses of equipment, of weddings, and customary presents, are not subject to be returned.—ff. L. 1, § 15, 16, De coll.; L. 20, § 6, L. 50, Fam. ercisc.; Lac. Rapport, s. 3; Poth. Suc. c. 4, p.180--; Lam. t. 44, a. 17; C. N. 852. [II. 299.]

721. The same rule applies to the profits which the heir may have derived from agreements made with the deceased, if at the time at which they are made they do not confer an indirect advantage.—ff. L. 36, L. 38, De cont. empt.; Cod. L. 3, L. 9, De cont. empt.; Poth. Suc. 180--; Cho. C. A. l. 3, c. 1, t. 4, n. 5; 2 Mal. 281 --; 7 P. Fr. 270, 275; C. N. 853. [II. 299.]

722. The profits and interest of the things subject to be returned are due only from the day when the succession devolves.—ff. L. 5, De dot. coll.; Cod. L. 20, De coll.; C. P. 309; Poth. Suc. c. 4, a. 2, § 3; Poc. r. 15, p. 227; Lam. t. 44, a. 29; Merl. Rapport. § 4, a. 2, n. 18; C. N. 856. [II. 299.]

723. Returns are due only from coheir to coheir; they are not due to the legatees nor to the creditors of the succession. —ff. L. 1, De coll.; Poth. Suc. c. 4, a. 2, § 6, C. O. t. 17 n. 88; Poc. r. 9, p. 225; 7 P. Fr. on a. 857, p. 301; C. N. 857. [II. 299.]

724. Returns are effected either in kind or by taking less. —C. P. 304, 305; 3 Lau. 20, 21, r. 16; Poc. r. 10, p. 226; C. N. 858. [II. 299.]

725. The return of moveable property is only made by taking less; it cannot be returned in kind.—Leb. Suc. l. 3, c. 6, s. 3; Fer. C. P. a. 306; Dup. C. P. l. 3, c. 6, s. 3; Poth. Suc. c. 4, a. 2, § 7, C. O. t. 17, n. 90; Bas. C. Nor., Arr. 9 Dec. 1653; 2 Mal. 290; 4 Conf. du C. 101 --; 7 P. Fr. 290; C. N. 868. [II. 299.]

726. The return of money received is also made by taking less in the money of the succession. In case of insufficiency the donee or legatee may dispense with the return of money, by abandoning a proportionate value in the moveable property, or in default of moveable property, in the immoveables of the succession.—Fer. C. P. a. 305; Poth. Ob.; Lac. 554; 7 P. Fr. 294, n. 476; 2 Chab. 550; C. N. 869. [II. 299.]

727. An immoveable given or bequeathed, which has perished by a fortuitous event, and without the fault of the donee or legatee, is not subject to be returned.—ff. L. 2, § 2, De coll.; L. 40, De cond. indeb.; L. 58, De leg.; Lac. 555; Poth. Suc. c. 4, a. 2, § 7, C. O. t. 17, n. 91; Leb. Suc. l. 3, c. 6, s. 3, n. 40; 2 Mal. 283; 7 P. Fr. 276; C. N. 855. [II. 299.]

728. [As to immoveables, the donee or legatee may at his option return them in all cases, either in kind or by taking less according to valuation].—C. P. 305; C. O. 306; 3 Lau. 20, 21; Poth. Suc. c. 4, a. 2, § 7, 8, C. O. t. 17. n. 194; Lac. 554; C. N. 858, 859, 860. [II. 301.]

729. If the immoveable be returned in kind, the donee or legatee has a right to be reimbursed the expenditures made upon it; those which were necessary, conformably to the rules established by article 417, and those which were unnecessary, according to article 582.—Poth. Mar. n. 577, Suc. c. 4, a. 2, § 7, C. O. t. 17, n. 92, 97; C. O. 306; Lac. 555; C. N. 861,2. [II. 301.]

730. The donee or legatee must, on the other hand, account for the injuries and deteriorations which have diminished the value of the immoveable returned in kind, if they result from his own act or from that of his representatives.—This rule does not apply if they have been caused by a fortuitous event, and without his or their participation.—Poth. Mar. n. 576, Suc. c. 4, a. 2, § 7, C. O. t. 15, n. 78, t. 17, n. 91; Lac. 555; C. N. 863. [II. 301.]

731. [When the return is made in kind, if the immoveable returned be hypothecated or encumbered, the copartitioners may require the donee or legatee to discharge it from such hypothec or incumbrance; if he fail to do so, he can only return by taking less.—The parties may however agree that the return shall be made in kind; this is effected without prejudice to the claims of the hypothecary creditors, which are charged in the partition of the succession to the party making the return.]—Leb. Suc. l. 3, c. 6, s. 4; Poth. Suc. c. 4, a. 2, § 6, al. 1, 2, C. O. t. 17, n. 92; Lac. 556; 2 Mal. 288; 7 P. Fr. 306; 4 Conf. du C. 96; C. N. 865. [II. 301.]

732. The coheir who returns an immoveable in kind may retain possession of it until he is effectively reimbursed the sums due to him for disbursements and ameliorations.—Poth. Suc. c. 4, a. 3, § 7; O. 1657, t. 27, a. 9; 1 Rog. 811; C. N. 867. [II. 301.]

733. The immoveables remaining in the succession are estimated according to their condition and value at the time of the partition.—Those which are subject to return, or which have been returned in kind, whether they have been given or bequeathed, are to be estimated according to their value at the time of the partition, according to the condition in which they were at the time of the gift, or, as to legacies, at the time when the succession devolved; regard being had to the provisions contained in the preceding articles.—Poth. Suc. c. 4, a. 2, s. 7, C. O. t. 17, n. 95; Lac. 555; C. N. 860, 861. [II. 301.]

734. The moveable things found in the succession, and those which are returned as being legacies, are likewise estimated according to their condition and value at the time of the partition, and those which are returned as having been given, according to their condition and value at the time of the gift.—Poth. Suc. c. 4, a. 2, § 7, C. O. t. 17, n. 90; Lac. 555; 4 Conf. du C. 101; 2 Mal. 290; 7 P. Fr. 290; C. N. 868. [II. 303.]

SECTION III.

Of payment of debts.

735. An heir who comes alone to the succession is bound to discharge all the debts and liabilities.—The same rule applies to a universal legatee.—A legatee by general title is held to contribute in proportion to his share in the succession.—A particular legatee is bound only in case of the insufficiency of the other property, and is also subject to hypothecary claims against the property bequeathed; saving his recourse against those who are held personally.—Cod. L. 2, L. 7, De her. et act.; L. 1, L. 2, Si un. ex plur.; C. P. 332-334; C. O. 360; 3 Lau. 141 --; Poth. Suc. c. 5, a. 2, al. 1, C. O. t. 17, n. 108, 126, Test. c. 2, s. 1, § 2; D. on a 870, p. 194; C. N. 870, 871. [II. 303.]

736. If there be several heirs or several universal legatees, they contribute to the payment of the debts and charges, each in proportion to his share in the succession.—Author. under art. 735; C. N. 870, 871. [II. 303.]

737. A legatee under general title, who takes concurrently with the heirs, contributes to the debts and charges in the same proportion.—C. P. 334; Poth. Suc. c. 5, a. 2, Test. c. 2, s. 1, § 2; C. N. 871. [II. 303.]

738. The obligation resulting from the preceding articles is personal to the heir and universal legatees, or legatees under general title; it gives a direct action, against each of them respectively, to the particular legatees and to the creditors of the succession.—ff. L. 80, De pign. act.; Cod. L. 2, L. 7, De her. act.; Poth. Suc. c. 5, a. 3, § 1, Test. c. 5, s. 3, a. 2; C. N. 873. [II. 303.]

739. In addition to the personal action, the heir and universal legatee, or legatee

under general title, are held hypothecarily for whatever claims affect the immoveables included in their share; saving their recourse against those who are personally liable, for their share, according to the rules applicable to warranty.—C. P. 333; 3 Lau. 144; Poth. Hyp. c. 2, s. 2, § 1, C. O. t. 16, n. 120; C. N. 871, 878. [II. 303.]

740. An heir or universal legatee, or a legatee under general title, who, not being personally bound, pays the hypothecary debts charged upon the immoveable included in his share, becomes subrogated in all the rights of the creditor against the other coheirs or colegatees for their share; conventional subrogation cannot in such a case have a greater effect; saving the rights of the beneficiary heir as creditor.—Cod. L. 22, De ju. delib.; C. P. 333; 3 Lau. 144; Poth. Suc. c. 5, a. 4, al. 9, 10; 2 Mal. 296; 7 P. Fr. 351,2; 2 Dem. on a. 875; C. N. 875. [II. 303.]

741. A particular legatee who pays an hypothecary debt for which he is not liable in order to free the immoveable bequeathed to him, has his recourse against those who take the succession, each for his share, with subrogation in the same manner as any other person acquiring under particular title.—ff. L. 57, De leg.; Poth. Suc. c. 5, s. 5, a. 4, n. 2, Test. s. 3, § 3, n. 6; 2 Mal. 295; 7 P. Fr. 347 --; C. N. 874. [II. 305.]

742. In the event of heirs or legatees exercising their recourse against their coheirs or colegatees, by reason of an hypothecary debt, the liability of such as are insolvent is divided rateably among all the others, in proportion to their respective shares. — ff. L. 36, L. 39, De fid. et mand.; L. 76, De solut.; 2 Mal. 296; 7 P. Fr. 353; 4 Toul. 541; C. N. 876. [II. 305.]

743. The creditors of the deceased and his legatees have a right to a separation of the property of the succession from that of the heirs and universal legatees, or legatees under general title, unless there is novation. This right may be exercised as long as the property exists in the hands of the latter, or upon the price of the sale, if it be yet unpaid.—ff. L. 1, De separ.; Cod. L. 2, De bon. auctor. jud.; Poth. Suc. c. 5, a. 4, al. 4, 18, 22, 24, 32, C. O. t. 17, n. 127; Merl. Séparation de patrim. § 5, n. 6; 2 Mal. 297, 8; 7 P. Fr. 357-368, especially 361; C. N. 878-880. [II. 305.]

744. The creditors of the heir or legatee are not allowed to claim this separation of property, nor to exercise any right of preference, against the creditors of the succession. —ff. L. 1, § 2, De Sep.; Leb. Suc. l. 4, c. 2, s. 1; Poth. Suc. c. 5, a. 4, al. 32, 34, C. O. t. 17, n. 130; 2 Mal. 298; 7 P. Fr. 366, 7; 2 Chab. 647; C. N. 881. [II. 305.]

745. The creditors of the succession and those of the copartitioners have a right to be present at the partition if they require it.—If the partition be made in fraud of their rights,

they may attack it in the same manner as any other act made to their detriment.—L. & B. let. R. n. 20, 21; Leb. Suc. l. 3, c. 8, s. 2, n. 23, 28; C. N. 865, 882. [II. 305.]

SECTION IV.

Of the effects of partition and of the warranty of shares.

746. Each copartitioner is deemed to have inherited alone and directly all the things comprised in his share, or which he has obtained by licitation, and to have never had the ownership of the other property of the succession.—ff. L. 20, L. 44, Fam. ercisc.; Cod. L. 1, Com. utri; Poth. Ob. n. 445, Com. n. 140, 711, 713, Vente, n. 631, Soc. n. 179, Suc. c. 4, a. 5, § 1; 2 Mal. 330; C. N. 883. [II. 305.]

747. Every act having for its object to put an end to indivision amongst coheirs and legatees is deemed to be a partition, although it should purport to be a sale, an exchange, a transaction, or have received any other name.—Cod. L. 20, De trans.; O. April, 1560; 2 Arr. de Bon. l. 3, t. 13, s. 3; Pap. l. 36, t. 7, a. 7; Poth. Soc. n. 174, Suc. c. 5, a. 6, p. 216; De L'H. l. 3, max. 3; Merl. Transaction, § 5, n. 13; C. N. 888. [II. 305.]

748. The copartitioners are respectively warrantors towards each other for all disturbances or evictions proceeding from a cause anterior to the partition.—Such warranty does not take place if the kind of eviction suffered have been excepted by some provision of the act of partition; it ceases if the party suffer eviction through his own fault. —ff. L. 20, L. 25, L. 33, Fam. ercisc.; Cod. L. 14, c. t.; L. 77, De evic.; Loy. Gar. des rentes, c. 3, n. 3; Poth. Vente, n. 633, Soc. n. 178, Com. n. 716-718, 723, 724, C. O. t. 17, n. 98, 99, Suc. c. 4, a. 5, § 3; 2 Mal. 300-2; C. N. 884. [II. 305.]

749. Each of the copartitioners is personally bound, in proportion to his share, to indemnify his coheir for the loss caused to him by the eviction. —If one of the copartitioners be insolvent, the portion for which he is liable must be divided rateably among all the solvent coheirs, according to their respective shares.—Cod. L. 1, L. 2, Si un. ex plur.; Poth. Com. n. 170, al. 1, Vente, n. 635, C. O. t. 17, n. 98, 100, Suc. c. 4, a. 5, § 3, al. 22, 23, 29; 2 Mal. 302; C. N. 885. [II. 305.]

750. There is no warranty against the insolvency of the debtor of a claim which has fallen to one of the coheirs, if such insolvency do not occur until after the partition.—Nevertheless, there is an action of warranty in the case of a rent, when the debtor of it has become insolvent at any time since the partition; unless the loss arises from the fault of the party to whom the rent was allotted.—The insolvency of debtors which exists at the time of the partition gives rise to warranty in the same manner

as eviction.—ff. L. 74, De evic., L. 4, De her. v. act. vend.; Leb. Suc. l. 4, c. 1, n. 66; Poth. Com. n. 723, al. 3, 5, 12, Vente, n. 634, Suc. c. 4, a. 5, § 3, al. 25, 28, 29; Lac. Partage, s. 4, n. 2; 7 P. Fr. 374; 2 Mal. 303; C. N. 886. [II. 307.]

SECTION V.

Of rescission in matters of partition.

751. Partitions may be rescinded for the same causes as other contracts.—[Rescission on the ground of lesion takes place in the case of minors only, according to the rules declared in the title *Of Obligations.*]—The mere omission of an object belonging to the succession does not give rise to the action of rescission, but only gives a right to a supplement of the act of partition.—C. 1001-1012; Cod. L. 1, Q. met. causâ; Poth. Ob. n. 35, Vente, n. 636, Soc. n. 174, Com. n. 715, Suc. c. 4, a. 6, al. 1, 2; Merl. Lésion, § 6; 2 Mal. 303-5; C. N. 887, 889. [II. 307.]

752. When it becomes necessary to decide whether there is lesion, the value of the objects at the time of the partition is to be considered.—Cod. L. 8, De resc. vend.; Leb. Suc. l. 4, c. 1, n. 59; C. N. 890. [II. 307.]

753. The defendant in an action of rescission of partition may arrest its progress and prevent the bringing of another, by offering and delivering to the plaintiff the supplement of his share in the succession, either in money or in kind.—Cod. L. 2, De resc. vend.; Leb. Suc. l. 4, c. 1. n. 62, n. 61; Dum. P. a. 33, gl. 1, n. 42; Poth. Suc. c. 4, a. 6; 2 Mal. 307; 7 P. Fr. 378; C. N. 891. [II. 309.]

TITLE SECOND.

OF GIFTS *INTER VIVOS* AND BY WILL.

CHAPTER FIRST.

GENERAL PROVISIONS.

754. A person cannot dispose of his property by gratuitous title, otherwise than by gift *inter vivos* or by will—ff. L. 1, de don.; 1 Ric. Don. pt. 1, n. 43; Poth. Don. 437, a. prél.; 1 J. A. 238; 7 N. D. 2; C. N. 893. [II. 309.]

755. Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favor of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolutive condition. — Poth. Ib.; ff. L. 1; L. 9; L. 19, § 2, de don.; L. 69, de reg. ju.; 1 Ric. pt. 1, n. 16; 2 Bour. 77, 105, 119; 2 Lam. 351; Guy.

Don. 164, 173; 7 N. D. 8, 49; C. N. 894. [II. 309.]

756. A will is an act of gift in contemplation of death, by means of which the testator, without the intervention of the person benefited, makes a free disposal of the whole or of a part of his property, to take effect only after his death, with power at all times to revoke it. Any acceptance of it purporting to be made in his lifetime is of no effect—ff. L. 1, de mort. causâ don.; L. 1, qui test.; 1 Ric. pt. 1, n. 37, 41, 82; Dom. Test. t. 1, s. 1, n. 4; Guy. Don. 164, Test. 99; 7 N. D. 6, 7; C. N. 895. [II. 309.]

757. Certain gifts may be made irrevocably *inter vivos* in a contract of marriage, to take effect, however, only after death. They partake of gifts *inter vivos* and of wills, and are treated of specially in the sixth section of the second chapter of this title.—O. D. a. 15; C. N. 897. [II. 309.]

758. Every gift made so as to take effect only after death, which is not valid as a will, or as permitted in a contract of marriage, is void.—1 Ric. pt. 1, n. 43; Guy. Don. 212; O. D. a. 15; Poth. Don. 442; 2 Lam. 350; C. N. 943, 947. [II. 309.]

759. The prohibitions and restrictions as to the capacity for contracting, alienating or acquiring, established elsewhere in this code, apply to gifts *inter vivos* and to wills, with the modifications contained in the present title. [II. 309.]

760. Gifts *inter vivos* or by will may be conditional.—An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift *inter vivos* depends, is void, and renders void the disposition itself, as in other contracts.—In a will such a condition is considered as not written, and does not annul the disposition.—ff. L. 7, de pact. dot.; L. 15, § 1, ad leg. Fal.; L. 1, de cond. ob turp.; L. 3, de cond. et dem.; Cod. L. 1, L. 2, L. 3 de don. q. sub modo; 1 Ric. p. 1, n. 1044; Dom. Test. t. 1, s. 8, n. 1, 18; Guy. Don, 173, 198; 5 N. D. 113-5; 7 Id. 9; Tr. Don. n. 212 --; Poth. Ob. n. 204, Test. 329; C. 1080; C. N. 900, 1172. [II. 311.]

CHAPTER SECOND.

OF GIFTS INTER VIVOS.

SECTION II.

Of the capacity to give and to receive by gift inter vivos.

761. All persons capable of disposing freely of their property, may do so by gift *inter vivos*, save the exceptions established by law.—C. P. 272; Poth. Don. 438; 1 Ric. pt. 1, n. 126; Guy. Don. 169; 7 N. D. 23; Tr. Don. n. 509; 5 Toul. n. 52; C. N. 902. [II. 311.]

762. Gifts purporting to be *inter vivos* are void, as presumed to be made in contemplation of death, when they are made during the supposed mortal illness of the donor, whether it be followed or not

by his death, unless circumstances tend to render them valid.—If the donor recover, and leave the donee in peaceable possession for a considerable time, the nullity is covered. —C. P. 277; 1 Ric. pt. 1, n. 87--; 2 Bour. Don. t. 4, c. 2, n. 1-3; Poth. Don. 439; 7 N. D. 25 --. [II. 311.]

763. Minors cannot give *inter vivos*, even with the assistance of their tutors, unless it be by their contract of marriage, as provided in the title *Of Obligations*.—Emancipated minors may nevertheless give moveable articles, according to their condition and means, and provided they do not materially affect their capital.—Tutors, curators and other administrators cannot give the property entrusted to them, except things of moderate value, in the interest of their charge.—The necessity of a wife being authorized by her husband applies to gifts *inter vivos*, whether for giving or for receiving.—Public corporations, even those having power to alienate, besides the special provisions and formalities which concern them, cannot give gratuitously without the sanction of the authorities to whom they are subject and of the main body of corporators; those who administer generally for corporations may nevertheless give alone, within the limits above defined as to tutors and curators. — Private corporations may give *inter vivos* in the same manner as individuals, with the consent of the main body of corporators.—C. P. 272; Poth. Pers. 615, Don. 438, 439; Guy. Don. 169, 170; Bour. Don. t. 1, c. 5, n. 8; 7 N. D. 23; Tr. Don. n. 586 --, 593; C. N. 903, 904, 1095. [II. 311.]

764. [The prohibitions and restrictions respecting gifts and benefits bestowed by future consorts in case of second marriages no longer exist.]—C. P. 279; Poth. Don. 447; 1 Ric. 61, n. 700, 1; 2 Bour. 197; C. N. 1098. [II. 313.]

765. All persons capable of succeeding and of acquiring may receive by gift *inter vivos*, saving by any exception established by law, and subject to the necessity of legal acceptance by the donee, or by a person qualified to accept for him.—Poth. Don. 438, 445, 456; Guy. Don. 169; 7 N. D. 33; Tr. Don. n. 509; C. N. 902. [II. 313.]

766. Corporations may acquire by gift *inter vivos*, as by other contracts, such property as they are allowed to possess. —C. 358; C. N. 910. [II. 313.]

767. Minors become of age, and persons who have been under the control of others, cannot give *inter vivos* to their former tutors or curators, so long as their administration actually continues and they have not rendered their account; [they may however give to their own ascendants who have exercised these offices.]—C. P. 276; Poth. Don. 450; 1 Ric. pt. 1, n. 457-465; Guy. Incapacité, 108; 7 N. D. 34; C. N. 907. [II. 313.]

768. Gifts *inter vivos* made in favor of the person with

whom the donor has lived in concubinage, or of the incestuous or adulterine children of such donor, are limited to maintenance. — [This restriction does not apply to gifts made in a contract of marriage entered into between the concubinaries.—Other illegitimate children may receive by gift *inter vivos* like all other persons.]—Ric. Don. pt. 1, n. 408 --; O. 1629, a. 132; Guy. Incapacité, 99; Merl. Concubinage, n. 2, 3; 7 N. D. 34; C. N. 908. [II. 313.]

769. [Gifts *inter vivos* made in favor of the priests or ministers of religion having the spiritual direction of the donor, of the physicians and others attending him with the view of restoring his health, or of the advocates and attorneys engaged in lawsuits in his behalf, cannot be set aside by mere presumption of law, as defective by reason of undue influence or want of consent. The presumption in this case, as in all others, must be established by facts.]—1 Ric. pt. 1, n. 498 --; Guy. Incapacité, 107; Poth. Don. 454, 5; C. N. 909. [II. 315.]

770. The prohibition against consorts benefiting each other during marriage by acts *inter vivos* is set forth in the title concerning marriage covenants.—C. N. 1099. [II. 315.]

771. The capacity to give or to receive *inter vivos* is to be considered relatively to the time of the gift. It must exist at each period, with the donor and with the donee, when the gift and the acceptance are effected by different acts.—It suffices that the donee be conceived at the time of the gift or when it takes effect in his favor, provided he be afterwards born viable.—1 Ric. pt. 1, n. 790, 1; Poth. Don. 455, 6; C. N. 906. [II. 315.]

772. The favor given to contracts of marriage renders valid the gifts therein made to the children to be born of the intended marriage.—It is not necessary that the substitute should be in existence at the time of the gift by which the substitution is created.—1 Ric. pt. 1, n. 869, 870; 2 Bour. 113; Poth. Don. 455; 7 N. D. 34, 53; C. N. 1081. [II. 315.]

773. A gift *inter vivos* of the property of another is void; it is however valid if the donor subsequently become proprietor of it.—Guy. Don. 173; 1 Th. Des. 192; Poth. Don. 486. [II. 3[illegible]

774. Dispositions made in favor of persons incapable of receiving are void, whether they are concealed under the form of onerous contracts, or executed in the name of persons interposed.—The ascendants, the descendants, the presumptive heir at the time of the gift, and the consort of the incapable person are held to be interposed, unless relations of kindred, or of services rendered, or other circumstances tend to destroy the presumption. — This nullity takes place even when the person interposed survives the person who is incapable.—1 Ric. pt. 1, n. 708 --; 2 Bour.

82--, 93; Guy. Avantage, 715; 2 N. D. 545--; 7 Id. 34; 1 Th. Dos. 200; C. N. 1099, 1100. [II. 315.]

775. [Children of a deceased person cannot claim legitim in consequence of gifts made by him *inter vivos*.]—C. P. 298; Guy. Légitime, 201; Poth. Don. 511; C. N. 913. [II. 317.]

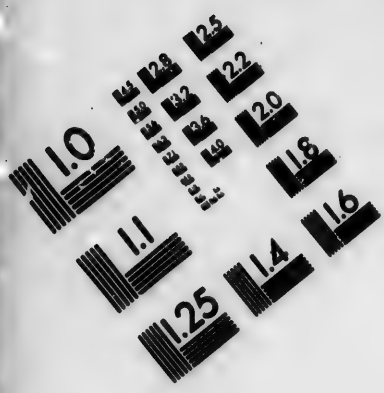
SECTION II.

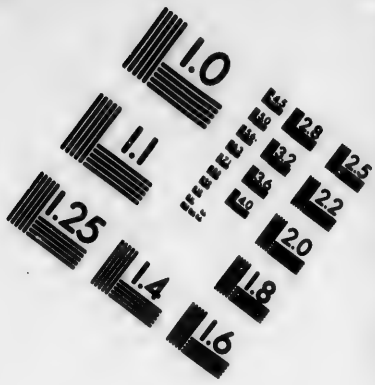
Of the form of gifts and of their acceptance.

776. Deeds containing gifts *inter vivos* must under pain of nullity be executed in notarial form and the original thereof be kept of record. The acceptance must be made in the same form.—Gifts of moveable property, accompanied by delivery, may however be made and accepted by private writings, or verbal agreements.—Gifts validly made out of Lower Canada, or within its limits but in certain localities excepted by statute, need not be in notarial form.—O. 1539, a. 133; Décl. Febr. 1549; Sal. O. p. 45; 3 Fer. C. P. 1089; O. 1731, a. 1, 2; Poth. Don. s. 2, a. 4; 2 Bour. 107, 123; Guy. Don. 178; 7 N. D. 55; C. S. L. C. c. 38; C. N. 931. [II. 319.]

777. It is essential to gifts intended to take effect *inter vivos* that the donor should actually divest himself of his ownership in the thing given. —[The consent of the parties is sufficient, as in sale, without the necessity of delivery.]—The donor may reserve to himself the usufruct or precarious possession, or he may pass the usufruct to one person, and give the naked ownership to another, provided he divests himself of his right of ownership.—The thing given may be claimed, as in the case of sale, from the donor who withholds it, and the donee may demand the rescission of the gift in default of its being delivered, without prejudice to his damages in cases where he may claim them.—[If without reservation of usufruct or of precarious possession, the thing given remain unclaimed in the hands of the donor until his death, it may be revendicated from his heirs, provided the deed has been registered during the lifetime of the donor.] —The gift of an annuity created by the deed of such gift, or of a sum of money or other indeterminate thing which the donor promises to pay or to deliver, divests the donor in the sense that he becomes the debtor of the donee.—C. P. 273-5; ff. L. 9, § 3, L. 2, § 6; L. 6, de don.; 1 Ric. pt. 1, n. 896, 903, 919, 920, 930, 948, 953, 955, 967; O. D. a. 15; Poth. Don. 464--; 2 Bour. 112; Guy. Don. 175, 178, 179, 180, 185; C. N. 899, 938, 949. [II. 319.]

778. Present property only can be given by acts *inter vivos*. All gifts of future property by such acts are void, as made in contemplation of death. Gifts comprising both present and future property are void as to the latter, but the cumulation does not render void the gift of the present property. — The prohibition contained in this





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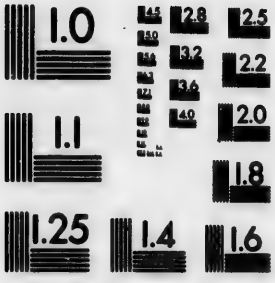

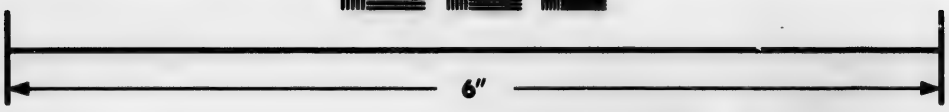

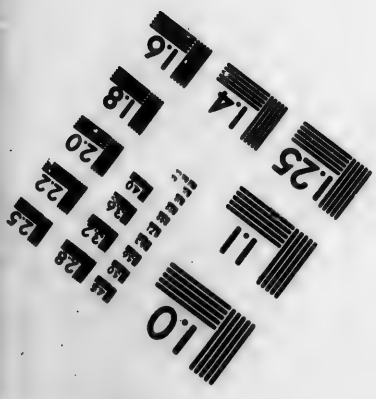

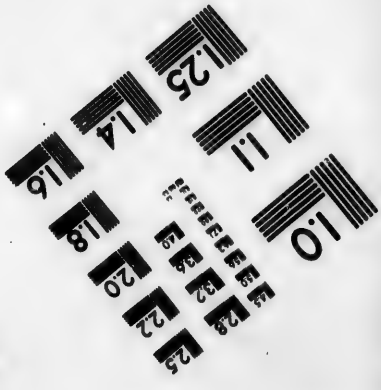

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article does not extend to gifts made in a contract of marriage. —1 Ric. pt. 1, n. 1024; Poth. Don. 467-9; O. D. a. 3, 4, 15; Sal. on do. 35,6; 7 N. D. 39, 50; 2 Bour. 119; C. N. 943. [II. 321.]

779. A donor may stipulate for the right of taking back the thing given, in the event of the donee alone, or of the donee and his descendants dying before him.—A resolutive condition may in all cases be stipulated, either in favor of the donor alone, or of third persons.—The right to take back, or any other resolutive right, is exercised in cases of gift in the same manner and with the same effects as the right of redemption in the case of sale.—Cod. L. 2, de don. q. sub mod.; C. P. 275; Poth. Ob. n. 72, 73; O. D. a. 15; C. 1029; 14 Merl. Q. 368, 378; Tr. Don. n. 1263 --; Archambault vs. Archambault, S. C. Montreal; C. N. 951, 952. [II. 321.]

780. A gift may consist of a person's whole property, and it is then universal; or of the whole of the moveable or immoveable property, of the whole of the property of the matrimonial community or of any other universality, or of an aliquot portion of such property, and is in such cases a gift by general title; or it may be limited to things particularly described, and is then a gift by particular title —1 Ric. pt. 1, n. 1656; 2 Bour. 102; Guy. Don. 170; Poth. Don. 456; 7 N. D. 36. [II. 321.]

781. The abandonment or the partition of present property is considered as a gift *inter vivos*, and is subject to the same rules.—The same disposition cannot be made in contemplation of death in an act *inter vivos*, except by means of a gift inserted in a contract of marriage, such as is treated of in the sixth section of this chapter.—Cons. of a. 754, 757; 7 N. D. 81; C. N. 1075. [II. 321.]

782. It may be stipulated that a gift *inter vivos* shall be suspended, revoked, or reduced, under conditions which do not depend solely upon the will of the donor.--If the donor reserve to himself the right to dispose of or to take back at pleasure some object included in the gift, or a sum of money out of the property given, the gift holds good for the remainder, but is void as to the part reserved, which continues to belong to the donor, except in gifts by contract of marriage.—C. P. 273, 274; O. D. a. 16; Poth. Don. 463,4; 1 Ric. pt. 1, n. 984 --, 1032, 1033, 1038, 1039, 1044 --; 1 Th. Des. 199; 7 N. D. 49, 81 --; C. N. 946, 947. [II. 323.]

783. All gifts *inter vivos* stipulated to be revocable at the mere will of the donor are void.—This does not apply to gifts made by contract of marriage.—C. P. 273, 274; 1 Ric. pt. 1, n. 970; C. N. 944, 947. [II. 323.]

784. Gifts *inter vivos* of present property are void if they are made subject to the condition of paying other debts or charges than those which exist at the time of such gifts,

or than those to come, the nature and amount of which have been expressed and defined in the deed or in the statement annexed to it.—This article does not apply to gifts by contract of marriage.—1 Ric. pt. 1, n. 1027, 1029; 7 N. D. 49; O. D. a. 16; Poth. Don. 463,4; C. N. 945, 947. [II. 323.]

785. The causes of nullity and prohibitions declared in the last three preceding articles and article 778, take effect notwithstanding all stipulations or renunciations by which it may be sought to evade them. —1 Ric. pt. 1, n. 1000; 7 N. D. 44. [II. 323.]

786. [Unless some special law requires it, a deed of gift need not be accompanied by a statement of the moveable property given; the legal proof of its nature and quantity devolves upon the donee.]—1 Ric. pt. 1, n. 963-5; Guy. Don. 174; O. D. a. 15; 7 N. D. 40; C. N. 948, 1085. [II. 323.]

787. Gifts *inter vivos* do not bind the donor nor produce any effect until after they are accepted. If the donor be not present at the acceptance, they take effect only from the day on which he acknowledges or is notified of it.—Ric. Don. pt. 1, n. 834-6; Guy. Don. 171; 1 N. D. 87. [II. 323.]

788. [The acceptance of a gift need not be in express terms. It may be inferred from the deed or from circumstances, among which may be counted the presence of the donee to the deed, and his signature.]—This acceptance is presumed in a contract of marriage, as well with regard to the consorts as to the future children. In gifts of moveable property this presumption also results from the delivery—Ric. Don. pt. 1, n. 838, 842, 869, 890, 891; Guy. Don. 171, 2; 7 N. D. 81; 1 Id. 87. [II. 325.]

789. Gifts *inter vivos* may be accepted by the donee himself, authorized and assisted if so it be, as in other contracts; minors, persons interdicted for prodigality, and those to whom an adviser has been judicially appointed, may also accept unassisted, saving their right to be relieved; tutors, curators and ascendants may accept in behalf of minors, as laid down in the title *Of Minority, Tutorship and Emancipation*, and curators appointed to interdicted persons may also accept for such persons. — The persons who compose a corporation or administer for it may also accept gifts in its behalf.—Ric. pt. 1, n. 844, 5; 2 Bour. 120, 1; Guy. Don. 171; 1 N. D. 89, 90; C. N. 933, 934, 935. [II. 325.]

790. In gifts *inter vivos* in favor of children born and to be born, where such gifts may be made, the acceptance by those who are born, or by a qualified person for them, holds good for the others not yet born, if they avail themselves of it. —1 Ric. pt. 1, n. 870. [II. 325.]

791. The acceptance may be subsequent to the deed of gift; but it must be made during the lifetime of the donor, and while he is still capable of giving.—Poth. Don. 460; Tr. Don. n. 1102; Ric. Don. pt. 1,

n. 792; C. N. 932. [II. 325.]

792. [Minors and interdicted persons cannot be relieved from the acceptance or repudiation made in their name by a qualified person, if it have been previously authorized by a judge, upon the advice of a family council. With these formalities the acceptance is as effectual as if it were made by a person of age, in the full exercise of his rights.]—Guy. Don. 172; Fer. Tutelles, 291; C. N. 942. [II. 325.]

793. Deeds of gift may be executed subject to acceptance, without the donee being therein represented. An acceptance purporting to be made by the notary, or other person not authorized, does not render the gift void, but it is without effect, and the confirmation by the donee can only avail as an acceptance from the time at which it takes place.—1 Ric. pt. 1, n. 866, 878, 835; 2 Bour. 129; O. D. a. 5; Poth. Don. e. t.; Guy. Accept. 99, Don. 171; O. 1539, a. 133. [II. 325.]

794. Gifts cannot be accepted after the death of the donee by his heirs or representatives. —Lem. 372; 2 Bour. 123; Poth. Don. 457 --. [II. 325.]

SECTION III.

Of the effect of gifts.

795. [Gifts *inter vivos* of present property when they are accepted, divest the donor of and vest the donee with the ownership of the thing given, as in sale, without any delivery being necessary.]—1 Ric. pt. 1, n. 899, 900, 902; 2 Bour. 109 -- ; Poth. Ob. 44, Don. 485, 7; Guy. Don. 179; 7 N. D. 39 --; C. N. 938. [II. 327.]

796. Gifts do not by the mere effect of law give rise to any obligation of warranty on the part of the donor, who is deemed to give the thing only in so far as it belongs to him. —Nevertheless if the cause of eviction arise from the indebtedness or the act of the donor, he is obliged, though he have acted in good faith, to reimburse the donee who has paid to free himself; unless the latter be bound to make such payment in virtue of the deed of gift, either by law or by agreement. — Warranty to a greater or less extent may be stipulated in gifts, as in any other contracts.—2 Bour. 106, 137; A. D. Garantie, n. 17; Poth. Don. 485, 6; 7 N. D. 22; 1 Th. Des. 192. [II. 327.]

797. A universal donee *inter vivos* of present property is personally liable for all the debts due by the donor at the time of the gift.—A donee by general title *inter vivos* of such property is personally liable for such debts in proportion to what he receives.—C. P. 334; 1 Ric. pt. 1, n. 1514, 1063; Poth. Don. 487-9; 2 Bour. 137; 7 N. D. 11-13; Tr. Don. 2415 i. f. [II. 327.]

798. Nevertheless the donee, by whatsoever title, may, if the things given be sufficiently particularized in the gift, or if he have made an inventory, free himself from the debts of the donor by rendering an account and giving up all that he has received.—If he be sued

hypothecarily only, he may, like any other possessor, free himself by abandoning the immoveable hypothecated, without prejudice to the rights of the donor, towards whom he may be bound to make the payment.—Poth. Don. 489; 2 Bour. 137, 8. [II. 327.]

799. A donee by particular title *inter vivos* is not personally liable for the debts of the donor. In case of an hypothecary action he may abandon the immoveable charged, like any other purchaser.—Poth. Don. 487; 2 Bour. 137, 8. [II. 327.]

800. The obligation to pay the debts of the donor may be extended or limited by the deed of gift, subject to the legal prohibitions concerning future and uncertain debts. — The right of the creditor in such case against the donee personally, beyond that which results from the law, is governed by the rules set forth as to delegation and indication in matters of payment in the title *Of Obligations*.—1 Ric. pt. 1, n. 1028; 7 N. D. 12. [II. 327.]

801. The exception of particular things, whatever may be their number or value, in a universal gift or a gift by general title, does not exonerate the donee from payment of the debts.—7 N. D. 11. [II. 329.]

802. The creditors of the donor have a right to demand the separation of his property from that of the donee, whenever the latter is liable for the debt, according to the rules laid down in the preceding title as to such separations in matters of succession. [II. 329.]

803. If at the time of the gift, and deduction being made of the things given, the donor were insolvent, the previous creditors, whether their claims are hypothecary or not, may obtain the revocation of the gift, even though the donee were ignorant of the insolvency. —In the case of insolvent traders, gifts made by them within three months previous to the assignment, or the writ of attachment in compulsory liquidation, are voidable, as presumed to be fraudulent.—1 Ric. pt. 1, n. 749--; C. 1032--. [II. 329; III. 379.]

SECTION IV.

Of registration as regards gifts inter vivos in particular.

804. Registration of gifts *inter vivos* in the offices established for the registration of real rights, takes the place of the inscription in the offices of the courts which is abolished. —Gifts of immoveables must be registered in the office of the division in which they are situate; gifts of moveable property, in the office of the division where the donor resided at the time of the gift.—O. 1539, a. 132; O. Mou. a. 58; O. D. a. 23; C. S. L. C. c. 37, s. 28, 29; C. N. 939. [II. 329.]

805. The effect of the registration of gifts *inter vivos* and of the neglect of such registration, is regulated, as to immo-

veables and real rights, by the general laws concerning the registration of such rights.—Beyond this the registration of gifts is required particularly in the interest of the heirs and the legatees of the donor, his creditors and all others interested, according to the following rules.—O. D. a. 27; C. S. L. C. c. 37, s. 1. [II. 329.]

806. All gifts *inter vivos*, of moveable or immoveable property, even those which are remuneratory, must be registered; save the exceptions contained in the two following articles. The donor himself cannot set up the want of registration, neither can the donee or his heirs; but it may be set up by any person entitled to do so under the general registry laws, by the heir of the donor, by his universal or his particular legatees, by his creditors, even though they be posterior and not hypothecary, and by all other persons interested in having the gift declared void.—O. Mou. a. 58; 1 Ric. pt. 1, n. 1231--; O. D. a. 20, 27; 2 Bour. 128; Guy. Don. 187; C. N. 941. [II. 329.]

807. Gifts made in the direct line by contract of marriage, are not affected by want of registration further than they may be under the general registry laws.—All other gifts in contracts of marriage, even between future consorts, or in contemplation of death, and all other gifts in the direct line, remain subject to registration in the same manner as gifts in general—1 Ric. pt. 1, n. 1107, 1123; 2 Bour. 132; O. D. a. 19, 22, 28. [II. 331.]

808. Gifts of moveable effects, whether universal or particular, are exempt from registration when they are followed by actual delivery and public possession by the donee. —1 Ric. pt. 1, n. 1151, 2; 2 Bour. 134. [II. 331.]

809. Gifts are subject to the rules concerning registration of real rights contained in the eighteenth title of this book, and are no longer subject to the rules which governed inscriptions in the prothonotary's office. —C. S. L. C. c. 37, s. 1, 9. [II. 331.]

810. The donor is not liable for the consequences of the want of registration, although he have bound himself to effect it. — Married women, minors and interdicted persons cannot be relieved from the failure to register the gift, but they have their recourse against those who neglected to effect such registration.—Husbands, tutors, administrators, and others whose duty it is to attend to such registration, cannot avail themselves of the absence of it.—1 Ric. pt. 1, n. 1172, 1238, 1239 --; 2 Bour. 128, 9; O. D. a. 18, 30-32; Guy. Don. 188; C. N. 940, 941, 942. [II.331.]

SECTION V.

Of the revocation of gifts.

811. Gifts *inter vivos* accepted are liable to be revoked:

1. By reason of ingratitude on the part of the donee;

2. By means of the resolutive

condition, in cases where it may be validly stipulated;

3. For the other legitimate causes by which contracts may be annulled, unless some particular exception is applicable.—Cod. L. 2, L. 8, de cond. ob caus. dat.; L. 1, L. 8, L. 10, de rev. don.; L. 1, L. 2, L. 3, de don. q. sub mod.; C. 991 --, 1006; O. D. a. 39; Poth. Don. 489 --, 502 --; 1 Ric. pt. 1, n. 557, 664 --, 1044 --; 2 Bour. 138, 142, 149, 151; 7 N. D. 52, 53; C. N. 953, 956. [II. 333.]

812. [In gifts, the subsequent birth of children to the donor does not constitute a resolutive condition, unless it is so stipulated.]—Ric. Don. pt. 1, n. 565, 574, 603 --, 648 --; Id. Rév. des don. 55, 56; O. D. 39 --; Poth. Don. 489 --; 2 Bour. 142-4, 7, 8; C. N. 960-966. [II. 333.]

813. Gifts may be revoked by reason of ingratitude, without a stipulation to that effect:

1. If the donee have attempted the life of the donor;

2. If he have been guilty towards him of ill usage, crimes, or grievous injuries;

3. If he refuse him maintenance, regard being had to the nature of the gift and the circumstances of the parties.—Gifts by contract of marriage are subject to this revocation, and so are remuneratory or onerous gifts in so far as they exceed the value of the services or of the charges.—Cod. L. 10, De revoc. don.; Poth. Don. 502--; 2 Bour. 138,9; Guy. Ingratitude, 228; C. N. 955, 956, 959. [II. 333.]

814. The demand of revocation on the ground of ingratitude must be made within a year from the date of the offence imputed to the donee, or within a year from the day when such offence became known to the donor.—Such revocation cannot be demanded by the donor against the heirs of the donee, nor by the heirs of the donor against the donee or his heirs, unless the action has been commenced by the donor against the donee himself, or unless, in the second case, the donor died within a year after the offence was committed or became known to him.—Cod. L. 10, de revoc. don.; Ric. pt. 1, n. 704 --, 730; 2 Bour. 140; Poth. Don. 502-9; C. 2262; C. N. 955-957. [II. 333.]

815. Revocation on the ground of ingratitude does not prejudice alienations made by the donee, nor hypothecs or other charges created by him, previously to the registration of the judgment of revocation, when the purchaser or creditor has acted in good faith.—In cases of revocation on the ground of ingratitude the donee is condemned to restore the thing given, if it be still in his possession, together with its fruits from the date of the judicial demand; if he have alienated it since such demand, he is condemned to restore what it was worth at the time of the demand.—Ric. Don. pt. 3. n. 714 --; 2 Bour. 141; Guy. Révocation, 702 --; Poth. Don. 507,8; C. N. 955, 956, 958. [II. 335.]

816. [Gifts cannot be re-

voked by reason of the non-fulfilment of obligations entered into by the donee, as charges or otherwise, unless the revocation is stipulated in the deed; and such revocation is subject in all respects to the same rules as the dissolution of sale in default of payment of the price, without the necessity of any preliminary condemnation obliging the donee to the fulfilment of his obligations.]—The stipulation of all other resolutive conditions when legally made has the same effect in gifts as in other contracts.—Ric. pt. 3, n. 1044; Guy. Don. 198; 7 N. D. 9; C. N. 953, 956. [II. 335.]

SECTION VI.

Of gifts by contract of marriage, whether of present property or made in contemplation of death.

817. The rules concerning gifts *inter vivos* apply to those which are made by contract of marriage, with such modifications as result from special provisions.—C. N. 1081, 1092. [II. 335.]

818. Fathers and mothers, and other ascendants, relations in general, and even strangers, may, in a contract of marriage, give to the future consorts or to one of them, or to the children to be born of their marriage, even with substitution, the whole or a portion of their present property, or of the property they may leave at their death, or of both together.—Ric. pt. 1, n. 1027; 2 Bour. 113,6; Guy. Don. 212; Poth Mar. n. 2; O. D. a. 17; 7 N. D. 81 --, 91, 92; C. N. 943, 1082, 1084, 1089. [II. 335.]

819. Subject to the same rules, when particular exceptions do not apply, future consorts may likewise, by their contract of marriage, give to each other, or one to the other, or to the children to be born of their marriage, property either present or future.—Ric. pt. 1, n. 364; 2 Bour. 113 --; O. D. a. 17; 7 N. D. 81 --; C. N. 943, 1091. [II. 335.]

820. Owing to the favor of marriage and the interest which future consorts may have in arrangements made in favor of third persons, it is lawful for relations, for strangers, and for the future consorts themselves, to make in a contract of marriage whereby the future consorts or their children are benefited by the same donor, all gifts whatsoever of present property to third parties, whether relations or strangers.—For the same reasons, the ascendants of a future consort may, in a contract of marriage by which he also is benefited, make gifts in contemplation of death in favor of his brothers or sisters. All other gifts in contemplation of death made in favor of third parties are void.—Leb. Suc. l. 3, c. 2, n. 12, 13; O. D. a. 17; Sal. on O. D. 43; Anouilh, Inst. cont. 38, 39; C. N. 943. [II. 335.]

821. Gifts of present property by contract of marriage are, like all others, subject to acceptance *inter vivos*. The

acceptance is presumed in the cases mentioned in the second section of this chapter. Third parties not present to the deed may accept separately, either before or after the marriage, gifts made in their favor.—Ric. pt. 1, n. 869, 875; Guy. Don. 172; O. D. a. 10, 12, 13; 7 N. D. 81; C. N. 1087. [II. 335.]

822. Gifts by contract of marriage of present or future property are valid, even as regards third parties, only in the event of the marriage taking place. If the donor or the third party who has accepted the gift die before the marriage, the gift is not void, but remains suspended by the condition that the marriage will take place.—Cod. L. 24. de nupt.; Bril. Don. n. 191; Poth. Com. intr. n. 17; Tr. Don. 2471 --, Mar. 90; C.N. 1088. [II. 335.]

823. Gifts of present property by contract of marriage cannot be revoked by the donor, even as regards third parties benefited who have not yet accepted, unless for legal grounds, or by reason of a resolutive condition validly stipulated.—Gifts in contemplation of death, made by such acts, are irrevocable in so far that the donor, without legal grounds or a valid resolutive condition, cannot revoke them, nor dispose of the given property by gift *inter vivos* or by will, unless it is in small amounts, by way of recompense or otherwise. He remains nevertheless owner in other respects of the property thus given and may dispose of it by onerous title and for his own benefit. Even if the gift in contemplation of death be universal he may acquire and possess property and dispose of it under the foregoing restrictions, and may contract, otherwise than by gratuitous title, obligations which affect the property thus given.—Poth. Don. 469; Guy. Inst. cont. 393 --; 7 N. D. 85 --; Tr. Don. 2348 --; C. N. 1083. [II. 335.]

824. It may be stipulated that a gift, either of present property or in contemplation of death, made in a contract of marriage, shall be suspended, revocable, reducible, or subject to changeable or indeterminate reservations and rights of resumption, although the effect of the disposition depend upon the will of the donor. If, in the case of reservations and of a right of resumption, the donor do not exercise his right, the donee retains the full benefit of the gift to the exclusion of the heir of the donor.—Ric. pt. 1, n. 1015; 7 N. D. 82; O. D. a. 17, 18; Poth. Don. 469; C. N. 944, 946, 1086, 1089, 1093. [II. 335.]

825. Gifts by contract of marriage may be made subject to the charge of paying the debts due by the donor at the time of his death, whether they are determinate or not.—In universal gifts or gifts by general title of future property, or of present and future property together, this obligation falls on the donee without stipulation to that effect, for the whole or in proportion to what

he receives.—O. D. a. 17; Poth. Test. 469; 7 N. D. 91 --; C. N. 947, 1084. [II. 337.]

826. The donee however, after the death of the donor, in gifts made wholly in contemplation of death, and so long as he has not otherwise accepted, may free himself from the debts by renouncing the gift, after making an inventory and rendering an account, and by giving back any property of the donor remaining in his possession, or which he may have alienated or mixed up with his own.—Poth. l. c.; O. D. l. c. [II. 337.]

827. In cumulative gifts of present and future property the donee may also, after the death of the donor and so long as he has not accepted otherwise the gift in contemplation of death, free himself from the debts of the donor other than those for which he is liable under the gift *inter vivos*, by renouncing in the same manner the gift in contemplation of death, to restrict himself to the present property given him—Author. under two prec. arts.; C. N. 1084. [II. 337.]

828. The donee may also at the same time renounce the present property and free himself from all liability, by making an inventory, rendering an account, and returning the property given, in the manner provided in respect of gifts in general.—C. 798. [II. 337.]

829. Notwithstanding the rule which excludes representation in the matter of legacies, gifts in contemplation of death made in favor of future consorts or of one of them, by their ascendants or other relations, or by strangers, are always, in the event of the donor surviving the consort benefited, presumed to be made in favor of the children to be born of the marriage, unless it is otherwise provided.—The gift becomes extinct if when the donor dies neither the consorts or consort benefited, nor any children of theirs be living, —Leb. Suc. l. 3, c. 2, n. 33-36; Lac. Donation, s. 7; 7 N. D. 85, 6; 4 Marc. n. 282-285; C. N. 1082. [II. 337.]

830. Gifts in contemplation of death made by contract of marriage, may be expressed in the terms of a gift, of an appointment of heir, of an assignment of dowry or dower, of a legacy, or in any other terms which indicate the intentions of the donor.—5 N. D. 544; C. N. 967. [II. 337.]

CHAPTER THIRD.

OF WILLS.

SECTION I.

Of the capacity to give and to receive by will.

831. Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favor of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation; saving the prohibi-

tions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals.—C. P. 292; C. S. L. C. c. 34, s. 2; C. N. 901. [II. 339.]

832. The capacity of married women to dispose of property by will is established in the first book of this code, in the title *Of Marriage*.—C. 184; C. N. 905. [II. 341.]

833. Minors, [even of the age of twenty years and over,] whether emancipated or not, are incapable of bequeathing any part of their property.—C. P. 293, 294, 296; Ric. pt. 1, n. 160 -- ; 2 Bour. 297; Poth. Test. 334; Guy. Test. 105; C. S. L. C. c. 34, s. 2; C. N. 903, 904. [II. 341.]

834. Tutors and curators cannot bequeath property for the persons under their control, either alone, or conjointly with such persons.—Persons interdicted for imbecility, insanity or madness cannot dispose of property by will. The will of a prodigal made subsequently to his interdiction may be confirmed or not according to circumstances and the nature of the dispositions. —A person to whom an adviser has been judicially appointed, whether at his own request or upon an application for his interdiction, may validly dispose of property by will.—Guy. Conseil Judiciaire; Id. Prodigue; Id. Interdiction, 703; A. D. Test. 713; Nov. 39, of Emp. Leo.; Poth. Test. 335; C. N. 901. [II. 341.]

835. The capacity of the testator is considered relatively to the time of making his will; nevertheless a will made previously to a condemnation from which civil death results, is without effect if the testator die while he is under the effect of such condemnation. — Ric. pt. 1, n. 797-9; Guy. Test. 123; Poth. Test. 332. [II. 341.]

836. Corporations and persons in mortmain can only receive by will such property as they may legally possess.—C. S. L. C. c. 34, s. 3. [II. 341.]

837. Minors and interdicted or insane persons, though incapable of bequeathing, may receive by will.—Ric. pt. 1, n. 126; 2 Bour. 156, 298; Poth. Test. 337; Guy. Légataire, 45; C. N. 906. [II. 341.]

838. The capacity to receive by will is considered relatively to the time of the death of the testator; in legacies the effect of which remains suspended after the death of the testator, whether in consequence of a condition, or in the case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect. — Persons benefited by a will need not be in existence at the time of such will, nor be absolutely described or identified therein. It is sufficient that at the time of the death of the testator they be in existence, or that they be then conceived and subsequently born viable, and be clearly known to be the persons intended by the testator. Even in the case of suspended legacies, already referred to in

this article, it suffices that the legatee be alive, or conceived, subject to the condition of being afterwards born viable, and that he prove to be the person indicated, at the time the legacy takes effect in his favor. —2 Ric. Don. 102; 2 Bour. 299; Guy. Légataire, 44-6, 53; C. N. 906. [II. 341.]

839. As regards testamentary dispositions, the legal presumptions of undue influence and want of will, arising from the relation of priest or minister, physician, advocate or attorney, in which the legatee stands towards the testator, have been destroyed by the introduction of the absolute freedom of disposing of property by will. Presumptions in these cases are to be established as in all others.—C. S. L. C. c. 34, s. 1; C. N. 909. [II. 343.]

SECTION II.

Of the form of wills.

840. Dispositions in contemplation of death made of a person's whole property, or of part thereof, in legal form by will or codicil, and whether they are expressed in the terms of an appointment of heir, of a gift, of a legacy, or in other terms indicating the intentions of the testator, take effect according to the rules hereinafter laid down, as universal legacies, legacies by general title, or as particular legacies. —Poth. Test. 314, 5; C. N. 967, 1002. [II. 343.]

841. Two or more persons cannot make a will by one and the same act, whether in favor of third persons or in favor of one another. — O. T. s. 77; Merl. Test. s. 1, § 1, a. 1; Ric. 345; 2 Bour. 311; 17 Guy. 135; C. N. 968. [II. 343.]

842. Wills may be made:

1. In notarial or authentic form;

2. In the form required for holograph wills;

3. In writing and in presence of witnesses, in the form derived from the laws of England.—C. S. L. C. c. 34, s. 3; Ric. pt. 1, n. 1482-4; Guy. Test. 141; 14 Geo. 3, c. 3, s. 10; C. N. 969. [II. 343.]

843. [Wills in notarial or authentic form are received before two notaries or before a notary and two witnesses; the testator, in their presence and with them signs the will or declares that he cannot do so, after it has been read to him by one of the notaries in presence of the other, or by the notary in presence of the witnesses. Mention is made in the will of the observance of the formalities.]—C. P. 289; C. O. 289; Ric. pt. 1, n. 1503 --; Poth. Test. 301, 2; 2 Bour. 304, 5; Guy. Test. 155; Fer. C. P. 289, gl. 5, n. 7; 1 Dupl. s. 3, a. 11, p. 591; 1 J. A. l. 2, c. 99; Fur. Test. c. 2, s. 3, n. 7; 6 Bril. Test. n. 93; O. 1735, a. 23; Sal. on same a.; C. N. 972. [II. 343; III. 379.]

844. Authentic wills must be made as originals remaining with the notary.—The witnesses must be named and described in the will. They must be of the male sex, of

full age, and must not be civilly dead, nor sentenced to an infamous punishment. [Aliens may serve as witnesses.] The clerks and servants of the notaries cannot. —The date and place of its execution must be stated in the will.—2 Bour. 304 --; Guy. Test. 141 --; Poth. Test. 306, 7, C. O. t. 16, n. 14; Tr. Don. 1447; C. S. C. c. 99, s. 115; C. N. 971, 972, 975, 980. [II. 343.]

845. [A will cannot be executed before notaries who are related or allied to the testator or to each other, in the direct line, or in the degree of brothers, uncles, or nephews. The witnesses however may be related or allied to the testator, to the notary, or to one another.]—2 Bour. 306, 7; Guy. Notaire, 206; Poth. Test. 306, 7; C. O. 16, n. 13. [II. 345.]

846. [Legacies made in favor of the notaries or witnesses, or to the wife of any such notary or witness, or to any relation of such notary or witness in the first degree, are void, but do not annul the other provisions of the will.]—Testamentary executors who are neither benefited nor compensated by the will may serve as witnesses to its execution.—C. P. 289; O. Bl. a. 63; Fer. C. P. 289, gl. 4, n. 20 ; Ric. Don. pt. 1, n. 554; O. f. a. 43; Poth. Test. 305-7, C. O. t. 16, n. 14; Lac. Témoin, s. 4, n. 4; Merl. Test. 404; Tr. Don. 1601. Author. under a. 107; C. C. V. 655; Author. under a. 853. [II. 347.]

847. Wills in authentic form cannot be dictated by signs. —[Deaf mutes and others who cannot declare their will by word of mouth, may do so, if they are sufficiently educated, by means of instructions written by themselves and handed to the notary, before or at the execution of the will.—Deaf mutes and such persons as cannot hear the will read, must read it themselves, and aloud, as regards those who are only deaf.—A written declaration that the deed contains the will of the testator and is prepared in accordance with his instructions, may be substituted for the same declaration by word of mouth, when it is required. — Mention must be made of the observance of these exceptional formalities and of their cause.—If the deaf mutes and others cannot avail themselves of the provisions of this article, they cannot make wills in the authentic form.—Ric. pt. 1, n. 141, 1503, 1530; 2 Bour. 296, 305; Guy. Test. 104. [II. 347.]

848. Further and special provisions exist for the district of Gaspe, to remedy the want of notaries for the execution of wills as well as of other acts. —[Saving these provisions of a local nature, ministers of religion cannot replace notaries in the execution of wills; neither can they serve otherwise than as ordinary witnesses.]—C. P. 289; Poth. Test. 300; 4 Geo. IV. c. 15; 3 & 4 V. c. 5. [II. 349.]

849. Wills made in Lower

Canada or elsewhere by military men in active service out of garrison, or by mariners during voyages, on board ship or in hospital, which would be valid in England as regards their form, are likewise valid in Lower Canada.—I. S. 1 V. c. 26, s. 10, 11; 29 Car. II. c. 3; 1 Will. IV. c. 20, s. 48; Pars. W. 24-30; C. N. 981. [II. 349.]

850. Holograph wills must be wholly written and signed by the testator, and require neither notaries nor witnesses. They are subject to no particular form.—Deaf mutes, who are sufficiently educated, may make holograph wills, in the same manner as other persons who know how to write.—2 Bour. 303; Poth. Test. 297, 8; Guy. Test. 137, 8; 1 Glf. Ev. § 366; C. N. 970. [II. 349.]

851. Wills made in the form derived from the laws of England, [whether they affect moveable or immoveable property,] must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, [which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.]—[Females may serve as attesting witnesses and the rules concerning the competency of witnesses are the same in all other respects as for wills in authentic form.]—I. S. 29 Car. II. c. 3, s. 5; 2 Glf. n. 676-8; 1 Jarman, 76; 7 L. C. R. 280, Lambert & Gauvreau; Lovelass, W. 315,6; I. S. 7 Will. IV.; 1 V. c. 26; 15, 16 V. c. 24. [II. 349; III. 379.]

852. Deaf mutes capable of understanding the meaning of a will and the manner of making one, and all other persons, whether literate or not, whose infirmity has not rendered them incapable of so understanding or of expressing their intentions, may dispose of property by will in the form derived from the laws of England, provided their intention and the acknowledgment of their signature or mark are manifested in presence of witnesses.—Glf. Ev. l. c. [II. 349.]

853. In wills made in the last mentioned form, legacies made to any of the witnesses, or to the husband or wife of any such witness or to any relations of such witness [in the first degree], are void, but do not annul the other provisions of the will. — The competency of testamentary executors to serve as witnesses to such wills, is subject to the same rules as in wills in authentic form.—I. S. 25 Geo. II, c. 6; 1 Steph. 575; Alnutt, P. W. 93, 170; 1 Jarman, W. 65--; Christie, P. W. 153, 171, 173; Pars. W. 19. [II. 351.]

854. In holograph wills, and in wills made in the form

derived from the laws of England, whatever comes after the signature of the testator is looked upon as a new act, which in the former case must likewise be written and signed by the testator, or signed only in the latter. In this latter case the attestation of the witnesses must follow each signature of the testator, or come after the last as witnessing the whole of the will preceding such signature.—In wills made in either of the forms mentioned in this article, date and place, need not be mentioned on pain of nullity. The judges or courts must decide in each case whether their absence creates any presumption against the will or renders uncertain any of its particular provisions.—The will need not be signed upon each page.—Ric. pt. 1, n. 1491; 2 Bour. 304; Poth. Test. 299; Guy. Test. 167, 169, 170; Pars. W. 13, 60; 1 Jarman, 78, 160. [II. 351.]

855. The formalities to which wills are subjected by the provisions of the present section must be observed on pain of nullity, unless there is some particular exception on the subject. — Nevertheless wills purporting to be made in one form, which are void as such in consequence of the inobservance of some formality, may be valid as made in another form, if they contain all the requisites of the latter. —7 L. C. R. Lambert vs. Gauvreau, 277; 1 Ric. pt. 1, n. 1617; C. N. 1001. [II. 351.]

SECTION III.

Of the probate and proof of wills.

856. The originals and legally certified copies of wills made in authentic form make proof in the same manner as other authentic writings.—C. 1215. [II. 351.]

857. Holograph wills and those made in the form derived from the laws of England, must be presented for probate to the court exercising superior original jurisdiction in the district in which the deceased had his domicile, or, if he had none, in the district in which he died, or to one of the judges of such court, or to the prothonotary of the district. The court, or judge, or the prothonotary, receives the depositions in writing and under oath of witnesses competent to give evidence, and these depositions remain affixed to the original will, together with the judgment, if it have been rendered out of court, or a certified copy of it, if it have been rendered in court. Parties interested may then obtain certified copies of the will, the proof and the judgment, which copies are authentic and give effect to the will until it is set aside upon contestation.—If the original of the will be deposited with a notary, the court or judge, or the prothonotary, causes such original to be delivered up.—Alnutt. P. W. 618; 41 Geo. III, c. 4, s. 2; C. S. L. C. c. 34, s. 3; Weatherly, G. P. 323; Poth, Test. 300; 8 Ency. 26;

6 Bril. 661, n. 176; 2 Steph. 193; Lovelass, W. 391, 417; Dorion & Dorion, Jugt. in appeal, 1861; C. N. 1007. [II. 351.]

858. The heir of the deceased need not be summoned to the probate thus made of the will, except it is so ordered in particular cases.—The functionary who takes the probate takes cognizance of all that relates to the will.—The probate of wills does not prevent their contestation by persons interested. — Alnutt, l. c.; Weatherly, 1; 1 Jarman, 22,3; 1 Glf. § 518; 2 Id. § 691, 692, 344. [II. 353.]

859. The acknowledgment of a will by the heir or by any interested person has its effect against him, as regards his right to contest its validity subsequently, but does not prevent the probate and the depositing of the will with the prothonotary in the proper manner, in so far as concerns other parties interested.—C. S. L. C. c. 37, s. 25, § 2; Lovelass, W. 418. [II. 353.]

860. When the minute or the original of a will has been lost or destroyed by a fortuitous event, after the death of the testator, or has been withheld without collusion, by an adversary or by a third party, the will may be proved in the manner provided in such case for other acts and writings in the title *Of Obligations*.—If the will have been destroyed or lost before the death of the testator without the fact ever having come to his knowledge, it may be proved in the same manner as if the accident had occurred after his death.—If the testator knew of the destruction or loss of the will and did not provide for such destruction or loss, he is held to have revoked it, unless he subsequently manifests his intention of maintaining its provisions.—C. 1217, 1218, 1219, 1233, 51; Tr. n. 2108; Lovelass, W. 342, 350; C. S. L. C. c. 37, s. 25, § 2. [II. 353.]

861. In cases where, in conformity with the preceding article, a non-produced will may be judicially proved, a probate of it may also be obtained, upon petition to that effect and positive proof both of the facts which justify such a proceeding and of the contents of the will. In such case probate of the will is held to be established according to the proof deemed sufficient, and to whatever modifications may be found in the judgment.—Weatherly, 86-8; Alnutt, 136; 2 Glf. § 688 a, 693; 1 Jarman, 136. [II. 355.]

862. The sufficiency of one witness applies to the probate and proof of wills, even of those lost or destroyed, if the court or judge be satisfied.—Alnutt, 170; 2 Glf. § 694. [II. 355.]

SECTION IV.

Of legacies.

§ 1. *Of legacies in general.*

863. Testamentary dispositions of property constitute legacies, either universal, or by general title, or by particular title.—Dom. Legs, s. 1, n. 1 Guy. Legs, 401; Poth.

Test. 315; C. 840; C. N. 1002, 1004. [II. 355.]

864. The property of a deceased person which is not disposed of by will, or concerning which the dispositions of his will are wholly without effect, remains in his abintestate succession, and passes to his lawful heirs.—Dom. Test. t. 1, s. 9, n. 15; Legs. t. 2; Guy. l. c.; Lovelass, 394. [II. 355.]

865. When a legacy made subject to another legacy lapses, from a cause dependent upon the legatee, the legacy to which it is thus subject does not therefore lapse, but is deemed to form a distinct disposition, charged upon the heir or legatee to whom the lapsed legacy accrues.—2 Bour. 328, & cit.; Poth. Test. 375, 6; Guy. Légataire, 75,6. [II. 355.]

866. The legatee may always repudiate the legacy so long as he has not accepted it. The acceptance may be either express or implied. Acceptance may be implied from the same acts as in abintestate successions. The right to accept a legacy, not previously repudiated, passes to the heirs and other legal representatives of the legatee, in the same manner as heritable rights derived from the law alone.—2 Bour. 326,7; Poth. Test. 397; Guy. Légataire, 55, 56, 60. [II. 355.]

867. Tutors and curators may accept legacies, subject to the same restrictions as in the case of abintestate successions. —The capacity of minors and of persons interdicted for prodigality, to accept legacies for themselves, is governed by the rules established for the acceptance of successions. — Guy. Légataire, 57. [II. 355.]

868. Accretion takes place in favor of the legatees in the case of lapsed legacies, when such legacies are made in favor of several persons jointly. —They are held to be so made when they are created by one and the same disposition and the testator has not assigned the share of each colegatee in the thing bequeathed. Directions given to divide the thing jointly disposed of into equal aliquot shares, do not prevent accretion from taking place.— The legacy is also presumed to be made jointly when a thing which cannot be divided without deterioration is bequeathed by the same act to several persons separately.— The right to accretion applies also to gifts *inter vivos* made in favor of several persons jointly, when some of the donees do not accept.—Dom. Test. t. 1, s. 9; 2 Bour. 339 --; Poth. Test. 406; Tr. Don. n. 1789; C. N. 1044. 1045. [II. 355.]

869. A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees. — 2 Ric. Subst. pt. 1, n. 753; *and con-*

sequence of unrestricted freedom of wills. [II. 357.]

870. Payment made in good faith to the ostensible heir, or to a legatee who is in possession of the succession, is valid against the heirs or legatees who present themselves afterwards; saving the recourse of the latter against him who has received without a right to do so.—C. 1145; Darg. on 410 C. Br., gl. 3, n. 1; Poth. Ob. 503; 7 Toul. n. 26, 29. [II. 357.]

871. Fruits and interest arising from the thing bequeathed accrue to the benefit of the legatee from the time of the death of the testator, when the latter has expressly declared in the will his intention to that effect.—Life-rents or pensions, bequeathed by way of maintenance, also begin from the date of the testator's death. —In all other cases, fruits and interest do not accrue until they are judicially demanded, [or until the debtor of the legacy is put in default.]—ff. L. 23, de leg. et fid.; Ric. pt. 2, n. 99; 2 Bour. 334, 5; Poth. Test. 382; Bac. c. 8, n. 25; C. N. 1015, [II. 363; III. 379.]

872. The rules concerning legacies and the presumptions of the testator's intention, as well as the meaning ascribed to certain terms, give way to the formal or otherwise sufficient expression of such intention, given in another sense or with a view to different effects. The testator may derogate from these rules in all that is not contrary to public order, to good morals, to any law containing a prohibition or some other applicable declaration of nullity, or to the rights of creditors and third persons.—Ric. Don. pt. 2, n. 129; 2 Bour. 353; Dom. Test. t. 1, s. 6, n. 2. [II. 357.]

§ 2. *Of universal legacies and legacies by general title.*

873. Universal legacies are testamentary dispositions by which the testator gives to one or to several persons the whole of the property he leaves at his death.—Legacies are only by general title when the testator bequeaths an aliquot part of his property, as a half, a third, or a universality, such as the whole of his moveable or immoveable property, or the whole of the private property excluded from the matrimonial community, or an aliquot part of any such whole.—All other legacies are by particular title. —The exception of particular things, whatever may be their number or value, does not destroy the character of universal legacies, or of legacies by general title.—Dom. Legs, t. 2; Guy. Légataire, 42, 3; Poth. Test. 315; Proud. Usuf. n. 1025, 1844, 1845; C. 780, 801; 1 Ric. pt. 3, n. 1527; C. N. 1003, 1010. [II. 357.]

874. The legatee has the same delays as the heir to make an inventory and to deliberate. If he have not assumed his quality within the delays, and be afterwards sued for the debts or charges attached to his legacy, he is not freed from the costs by his renunciation, any more than the heir would be.—*Consequence of ap-*

similating legatees to heirs. [II. 357.]

875. The liability of a universal legatee, or of a legatee by general title, or by particular title, for the debts and hypothecs, is explained in the title *Of Successions*, and, in certain respects, in the present section, and also in the title *Of Usufruct.*—[II. 357.]

876. The legatee of a usufruct bequeathed as a universal legacy, or as a legacy by general title, is personally liable towards the creditors for the debts of the succession, even for the principal, in proportion to what he receives; he is hypothecarily liable for whatever claims affect the immoveables included in his share, as any other legatee by the same title, and with the same recourse. The valuation is made proportionately between him and the proprietor in the manner and according to the rules set forth in article 474.—ff. L. ult. De usu. et usuf.; Lac. Usufruit, s. 2, n. 15; Guy. Usufruit, 396; 10 Demol. n. 523, 543, 604; Proud. Usufruit, n. 475, 1859, 1889. [II. 357.]

877. A testator may change, among his heirs and legatees, the manner and proportions in which the law holds them liable for the payment of the debts and legacies, without prejudice to the personal or hypothecary action of the creditors against those who are legally subject to the right claimed, and saving the recourse of the latter against those upon whom the testator imposed the obligation.—1 Ric. p. 2, n. 18, 52, 306; Guy. Légataire, 100; 2 Ric. Disp. condit. n. 214. [II. 359.]

878. [Universal legatees and legatees by general title cannot, after acceptance, free themselves from personal liability for the debts and legacies imposed upon them by law or by the will, without having obtained benefit of inventory; they are in this respect, and in all that concerns their administration, the rendering of their account and their discharge from liability, subject to the same rules as the heir, and to the obligation of registering.—Legatees by particular title upon whom the will imposes debts and charges of uncertain extent, may, in the same manner as the heir and universal legatee, accept only under benefit of inventory.]—2 Bour. 324-5; Guy. Légataire, 94-5; Ric. pt. 3, n. 1506, 1509, 1517, 1519. [II. 359.]

879. The creditors of a succession have a right to the separation of property against a legatee liable for a debt, in the same manner as against an heir, for the portion in which he is liable.—C. S. L. C. c. 37, s. 27, § 3; Consequence of a. 891. [II. 359.]

§ 3. *Of legacies by particular title.*

880. The debts of a testator must in all cases be paid in preference to his legacies.—Particular legacies are paid by the heirs, or universal legatees, or legatees by general title, each in the proportion for which he is liable, as in the contribution to the debts, and the legatee

has a right to demand the separation of property.—If the legacy be imposed upon one particular heir or legatee, the personal action of the legatee by particular title does not extend to the others.—The right to a legacy does not carry with it a hypothec upon the property of the succession, but the testator, whatever may be the form of the will, may secure it by a special hypothecation requiring, as regards the rights of third parties, that the will be registered.—Poth. Don. 353, 370-3; 2 Voët, l. 20, n. 27;—Bril. Legs, n. 112; C. S. L. C. c. 37, s. 1, 25; Tr. Don. n. 1793, & *n.*, 1928, 9; 2 Bour. 323, 325; C. N. 1017. [II. 359.]

881. [The bequest of a thing which does not belong to the testator, whether he was aware or not of another's right to it, is void, even when the thing belongs to the heir or legatee charged with the payment of it.—The legacy is however valid, and is equivalent to the charge of procuring the thing or of paying its value, if such appear to have been the intention of the testator. In such case, if the thing bequeathed belong to the heir or the legatee charged with the payment of it, whether the fact was known or not to the testator, the particular legatee is seized of the ownership of his legacy.]—Ric. pt. 3, n. 282-4-5, 291 --; 2 Bour. 351, 2; Poth. Test. 363-5; Lac. Legs, pt. 2, s. 2; 2 Desp. pl. 288 --, n. 3, 4; C. N. 1021. [II. 361.]

882. [If the thing bequeathed belonged to the testator for a part only, he is presumed to have bequeathed only the part which belonged to him, even when the remainder belongs to the heir or principal legatee, unless his intention to the contrary is manifest.]—The same rule applies to the bequest made by one of the consorts of a thing belonging to the community; saving the right of the legatee to the whole of the thing bequeathed under the circumstances enumerated in the title concerning marriage covenants, and generally in the case of the following article.—Auth. under a. 881. [II. 361.]

883. [If the testator since the making of the will have become, wholly or in part, owner of the thing bequeathed, the legacy is valid as regards whatever remains in his succession, notwithstanding the provisions contained in the preceding article; excepting the case in which the thing remains in the succession only by reason of the nullity of a subsequent voluntary alienation of it by the testator.—C. N. 1021. [II. 363.]

884. When a legacy by particular title comprises a universality of assets and liabilities, as for example a certain succession, the legatee of such universality is held personally and alone for the debts connected with it, without prejudice to the rights of the creditors against the heirs and universal legatees, or legatees by general title, who have their recourse against the particular legatee.—Proud.

Usufruit, n. 1025 --, 1845 --. [II. 363.]

885. In the case of insufficiency of the property of the succession or of the heir or legatee liable for the payment, the legacies entitled to preference are paid first, and the remainder is then divided rateably among the other legatees in proportion to the value of their respective legacies. Legatees of a certain and determinate object take it without being bound to contribute to the payment of the other legacies which have no preference over theirs.—Ric. pt. 3, n. 1530; 2 Bour. 322-5; Poth. Test. 352 --; Guy. Légataire, 85, 96, 100. [II. 363.]

886. To obtain the reduction of particular legacies, the creditors must first have discussed the heir or legatee who is personally bound, and have availed themselves in time of the right to separation of property.—The creditors exercise this reduction against each of the particular legatees for a share only, in proportion to the value of his legacy, but the particular legatees may free themselves by giving up the particular legacies or their value.—Auth. under a. 885. [II. 363.]

887. Creditors of the succession, in the case of reduction of particular legacies, have a preferable right to the thing bequeathed, over the creditors of the legatee, as in the case of separation of property.—A particular legatee suffering such reduction has his recourse against the heirs or legatees who are personally liable, and is substituted by law in all the rights of the creditor thus paid. —Guy. Légataire, 97; 2 Bour. 323, 232, 3. [II. 363.]

888. When an immoveable bequeathed has been increased by further acquisitions of property, the property thus acquired, even if it be contiguous, is not deemed to form part of the legacy, unless from its destination and the circumstances it may be presumed that the testator intended it to form a mere dependency, constituting with the immoveable bequeathed but one and the same property. — Buildings, embellishments and improvements are deemed to be adjuncts of the thing bequeathed. —Poth. Test. 379; 2 Bour. 338; 1 Th. Des. 494; C. N. 1019. [II. 363.]

889. [If before or since the will, the immoveable bequeathed have been hypothecated for a debt of the testator remaining still due, or even for the debt of a third person whether it was known or not to the testator, the heir, or the universal legatee, or the legatee by general title is not bound to discharge the hypothec, unless he is obliged to do so by the will.] A usufruct established upon the thing bequeathed is also borne without recourse by the particular legatee. The same rule applies to servitudes. —If however the hypothecary debt of a third person, of which the testator was ignorant, affect at the same time the particular legacy and the property remaining in the succes-

sion, the benefit of division may reciprocally be claimed. —ff. L. 57, L. 69, § 3, de leg. et fid. 1, 1; 2 Bour. 332; Poth. Test. 377; Guy. Légat. 97; C. N. 1020. [II. 365.]

890. A legacy made in favor of a creditor is not deemed to be in compensation of his claim, nor that in favor of a servant in compensation of his wages.—ff. L. 28, L. 29, de leg. et fid.; Ric. pt. 2, n. 168; 2 Bour. 360; Guy. Légataire, 102, 3; C. N. 1023. [II. 365.]

§ 4. *Of the seizin of legatees.*

891. Legatees by whatever title, are, by the death of the testator, or by the event which gives effect to the legacy, seized of the right to the thing bequeathed, in the condition in which it then is, together with all its necessary dependencies, and with the right to obtain payment, and to prosecute all claims resulting from the legacy, without being obliged to obtain legal delivery. —C. S. L. C. c. 34, s. 2. [II. 365; III. 379.]

SECTION V.

Of the revocation and lapse of wills and legacies.

892. Wills and legacies cannot be revoked by the testator except:

1. By means of a subsequent will revoking them either expressly or by the nature of its dispositions;

2. By means of a notarial or other written act, by which a change of intention is expressly stated;

3. By means of the destruction, tearing or erasure of the holograph will, or of that made in the form derived from the laws of England, deliberately effected by him or by his order, with the intention of revoking it; and in some cases by reason of the destruction or loss of the will by a fortuitous event becoming known to him, as explained in the third section of the present chapter;

4. By his alienation of the thing bequeathed.—ff. L. 3, § 11, L. 15, L. 16, de adim. v. transf.; Poth. Test. 386-391; Ric. pt. 3, n. 121-6, 134, 239, 262, 273--; 2 Bour. 381-6, 397-8; Tr. Don. n. 2048, 2107--; C. N. 1035. [II. 365.]

893. The revocation of a will or of a legacy may also be demanded: 1. On the ground of the complicity of the legatee in the death of the testator, or by reason of grievous injury done to his memory, in the same manner as in the case of legal succession, or, if the legatee hindered the revocation or modification of the will; 2. By reason of the resolutive condition;—Without prejudice to the causes for which the validity of the will or legacy may be impugned.—The subsequent birth of children to the testator does not effect a revocation.—[Enmity springing up between him and the legatee does not establish a presumption of revocation.—Ric. pt. 3, n. 688--; 2 Bour. 396, 403-4; Poth. Test. 387-396; C. S. L. C. c. 34, s. 2; C. N. 1046, 1047. [II. 367.]

894. Subsequent wills which

do not revoke the preceding ones in an express manner, annul only such dispositions therein as are inconsistent with or contrary to those contained in the later wills.—Ric. pt. 3, n. 148,9; 2 Bour. 312, 358-9, 385, 395; Poth. Test. 386, 390, 404--; C. N. 1036. [II. 367.]

895. A revocation contained in a subsequent will retains its full effect, although such will should remain inoperative by reason of the incapacity of the legatee or of his refusal to accept.—A revocation contained in a will which is void by reason of informality, is also void.—Ric. pt. 3, n. 168,9; 2 Bour. 393; Poth. Test. 388-390; C. N. 1037. [II. 367; III. 379.]

896. In the absence of express dispositions, the circumstances and the indications of the intention of the testator determine whether, upon the revocation of a will which revokes another will, the former will revives.—2 Bour. 390; Tr. Don. 2065; Ric. Don. pt. 3, n. 178. [II. 367.]

897. [Every alienation by the testator of the right of ownership in the thing bequeathed, even in a case of necessity, or by forced means, or with right of redemption reserved, or by exchange, carries with it, unless he has otherwise provided, a revocation of the will or legacy for all that has been thus disposed of, even though, if it were voluntary, the alienation be void.]—The revocation subsists although the thing should afterwards have returned into the hands of the testator, [unless he appears to have intended the contrary.]—Ric. pt. 3, n. 262--; 2 Bour. 398, 9; Voët. P. de adim. leg. n. 6; Poth. Test. 390, 1; 2 Pand. 431, n. 8; Tr. Don. 2095; C. N. 1038. [II. 369.]

898. A person cannot, otherwise than by the effect of gifts in contemplation of death made by contract of marriage, forego his right to dispose of his property by will or by gift in contemplation of death, or to revoke his testamentary dispositions. Nor can a person subject the validity of any future will to formalities, expressions or signs not required by law, or to other derogatory clauses.—O. T. a. 76; Poth. Test. 392, 3; Hen. l. 5, c. 2, q. 13; Ric. Don. pt. 3, n. 74--; 2 Bour. 380; Pap. l. 20, t. 1, a. 4, 5; Observations sur Henrys, l. c. n. 8--; Arr. cited by Ric. l. c. [II. 369.]

899. [Heirs cannot be excluded from successions, unless the act excluding them is clothed with all the formalities of a will.] [II. 369.]

900. Every testamentary disposition lapses if the person in whose favor it is made do not survive the testator.—Ric. pt. 2, n, 56; 2 Bour. 393, 4; Poth. Test. 394; C. N. 1039. [II. 369.]

901. Every testamentary disposition made under a condition which depends on an uncertain event, lapses if the legatee die before the fulfilment of the condition.—Poth. Test. 394, 395; 2 Bour. 394; C. N. 1040. [II. 369.]

902. Conditions which are

intended by the testator to suspend only the execution of a disposition, do not prevent the legatee from having an acquired right transmissible to his heirs. —Poth. Test. 368; 2 Bour. 371; C. 1089; C. N. 1041. [II. 369.]

903. A legacy lapses if the thing bequeathed perish totally during the lifetime of the testator.—The loss of a thing bequeathed which happens after the death of the testator falls upon the legatee, except cases wherein the heir or other holder may be responsible according to the rules applicable generally to things which form the subject of obligations.—Ric. pt. 3, n. 314 --; 2 Bour. 399, 400, 402; Poth. Test. 397 --; Lac. Legs, s. 16; C. 1049, 1050, 1063, 1064, 1065, 1067, 1068; C. N. 1042. [II. 369.]

904. A testamentary disposition lapses when the legatee repudiates it or is incapable of receiving under it.—Ric. pt. 3, n. 416; 2 Bour. 339; Poth. Test. 387, 395, 396; C. N. 1043. [II. 369.]

SECTION VI.

Of testamentary executors.

905. A testator may name one or more testamentary executors, [or provide for the manner in which they shall be appointed; he may also provide for their successive replacement.]—Heirs or legatees may lawfully be appointed testamentary executors.—Creditors of the succession may be executors without forfeiting their claims. — Single women or widows may also be charged with the execution of wills.—The courts and judges cannot appoint nor replace testamentary executors, [except in the cases specified in article 924.] —If there be no testamentary executors, and none have been appointed in the manner in which they may be, the execution of the will devolves entirely upon the heir or the legatee who receives the succession.—Ric. Don. pt. 2, n. 63, 64, 67; Guy. Exéc. test. 158; Poth. Test. 359; 2 Bour. 373,4; C. N. 1025. [II. 371.]

906. Married women cannot accept testamentary executorship without the consent of their husbands. — Single women and widows who marry while they are testamentary executors, do not forfeit their office by mere operation of law, even though they have entered into community of property with their husbands, but they require the consent of the latter to continue the exercise of such office.—A testamentary executrix separated as to property from her husband, either by contract of marriage or by judgment, may, if he refuse the consent necessary for her to accept or to exercise the office, obtain judicial authorization as in the cases provided for in article 178.—Ric. Don. pt. 2, n. 67; Poth. Test. 359; Guy. l. c.; 2 Bour. 373; Bril. Exéc. test. n. 13; C. N. 1029. [II. 371.]

907. Minors cannot act as testamentary executors, even with the authorization of their tutors.—Nevertheless emancipated minors may do so, pro-

vided the executorships be of small importance in proportion to their means.—Poth. Test. 360; C. N. 1030. [II. 371.]

908. The incapacity of corporations to execute wills is declared in the first book. —Persons who compose a corporation, or such persons and their successors, may be appointed to execute wills in their purely personal capacity, and may act in that behalf if such appear to have been the intention of the testator, although he may have designated them solely by the appellation which belongs to them in their corporate capacity.—The same rule applies to persons designated by the title which belongs to their office or position, and to their successors.—Ric. Don. pt. 2, n. 69, 70; Poth. Test. 368. [II. 371.]

909. Subject to the preceding provisions, persons who cannot obligate themselves cannot be testamentary executors.—Ric. Don. pt. 2, n. 68; Poth. Test. 359; Guy. Exéc. Test. 153; C. N. 1028. [II. 373.]

910. No person can be compelled to accept the office of testamentary executor. — Its duties are performed gratuitously, unless the testator has provided for their remuneration.—If a legacy made in favor of a testamentary executor have no other cause than such remuneration, and he do not accept the office, the legacy lapses by reason of the failure of the condition.—If he accept the legacy thus made, he is presumed to have accepted the executorship. — Testamentary executors are not bound to be sworn; nor to give security, unless they have accepted with that condition.—They are not liable to coercive imprisonment. —Cod. L. 3, de cond. insert.; Ric. Don. pt. 2, n. 95; Bac. Bâtardise, c. 7, n. 14; 4 Fur. Test. 156; Poth. Test. 359, 366; Guy. Exéc. Test. 159; Lac. c. v. n. 13; Merl. Cont. par corps, § 5, l. f.; Pap. l. 20, t. 9, n. 10, n.; O. 1667, t. 34, a. 1. [II. 373.]

911. A testamentary executor who has accepted the office cannot renounce it [without the authorization of the court or of a judge, which may be granted for sufficient cause; the heirs and legatees and other executors, if there be any, being present, or having been duly called.—Difference of opinion between an executor and the majority of his co-executors, as to the execution of the will, may constitute a sufficient cause.] — Pars. W. 102 -- ; Guy. Exéc. test. 159; N. D. Exéc. 209, 220. [II. 373.]

912. If several testamentary executors have been appointed, and some of them only, or even one of them alone, have accepted, they or he may act alone, unless the testator has otherwise ordained.—In like manner, if several have accepted, but some or one only of them survive, or retain the office, they or he may act alone until the others are replaced, in the cases admitting of it, unless the testator has expressed himself to the contrary.—Bac. Bâtardise, c. 7, n. 9; Ric. pt. 2, n. 65; 2 Bour. 374. [II. 373.]

913. If there be several joint testamentary executors, with the same duties to perform, they have all equal powers and must act together, unless the testator has otherwise ordained. —[Nevertheless if any of them be absent those who are in the place may perform alone acts of a conservatory nature and others requiring dispatch.]—The executors may also act generally as attorneys for each other, unless the intention of the testator appears to the contrary, and subject to the responsibility of the one who grants the power. The executors cannot delegate generally the execution of the will to others than their co-executors, but they may be represented by attorney for determinate acts.—Executors exercising these joint powers, are jointly and severally bound to render one and the same account, unless the testator has divided their functions and each of them has kept within the scope assigned to him.—They are responsible only each for his share for the property of which they took possession in their joint capacity, and for the payment of the balance due, saving the distinct liability of such as are authorized to act separately.—Cho. C. P. l. 2, t, 7, n. 4; Guy. Exéc. test. 106; Lac. Exéc. test. n. 15; Pars. W. 91, 95; N. D. Exécut. 234; 2 Bour. 378, & Mor. there cited—C. N. 1033. [II. 375.]

914. The expenses incurred by the testamentary executor in the fulfilment of his duties are borne by the succession.—Poth. Test. 366; Ric. pt. 2, n. 96; 2 Bour. 378; N. D. Exécut. 223, 233; C. N. 1034. [II. 375.]

915. A testamentary executor may, before the probate of the will, perform acts of a conservatory nature or which require dispatch, provided he obtains such probate without delay, and furnishes proof of it when required.—Pars. W. 88; 2 Bour. 379; 8 N. D. 222. [II. 375.]

916. The testator may limit the obligation incumbent upon the executor of making an inventory and rendering an account of his administration, and even free him from it entirely. —This discharge does not release him from the payment of what remains in his hands, unless the testator intended to leave him the disposition of the property without responsibility, or to constitute him legatee, or that the terms of the will otherwise import the release from payment.—Ric. Don. pt. 1, n. 589, 765; pt. 2, n. 70, 90, 91, 92; Bac. Bâtard. c. 7, n. 18; Poth. Test. 365. [II. 375.]

917. [If, having accepted, a testamentary executor refuse or neglect to act, or dissipate or waste the property, or otherwise exercise his functions in such a manner as would justify the dismissal of a tutor, or if he have become incapable of fulfilling the duties of his office, he may be removed by the court having jurisdiction.]—8 N. D. 213; 3 L. C. R. 71, Dease & McIntosh. [II. 377.]

918. Testamentary executors, for the purposes of the execution of the will, are seized

as legal depositaries of the moveable property of the succession, and may claim possession of it even against the heir or legatee.—This seizin lasts for a year and a day reckoning from the death of the testator, or from the time when the executor was no longer prevented from taking possession, —When his duties are at an end, the testamentary executor must render an account to the heir or legatee who receives the succession, and pay him over the balance remaining in his hands.—Ric. Don. pt. 2, n. 71, 72, 74, 76; Poth. Test. 360-366; 2 Bour. 374-7-8; N. D. 211-3-4, 230; C. N. 1026, 1031. [II. 377.]

919. The testamentary executor must cause an inventory to be made after notifying the heirs, legatees, and other interested persons to be present. He may however perform immediately all acts of a conservatory nature or which require despatch.—He attends to the obsequies of the deceased.—He procures the probate of the will and its registration when necessary.—If the validity of the will be contested he may become a party to support it.—He pays the debts and discharges the particular legacies, with the consent of the heir or of the legatee who receives the succession, or, after calling in such heir or legatee, with the authorization of the court.—In the case of insufficiency of moneys for the execution of the will, he may, with the same consent, or with the same authorization, sell moveable property of the succession to the amount required. The heir or legatee may however prevent such sale by tendering the amount required for the execution of the will.—The testamentary executor may receive the debts due and may sue for their recovery.—He may be sued for whatever falls within the scope of his duties, saving his right to call in the heir or the legatee.—Ric. pt. 2, n. 79-81, 86-88, 94; Poth. l. c.; 2 Bour. 376; 8 N. D. 228; C. N. 1031. [II. 377.]

920. The powers of a testamentary executor do not pass by mere operation of law to his heirs or other successors, who are however bound to render an account of his administration, and of whatever they may themselves have actually administered.—Poth. Test. 367-8; 8 N. D. 220, n. 10; 2 Bour. 374; C. 1043; C. N. 1032. [II. 377.]

921. The testator may modify, restrict or extend the powers, the obligations and the seizin of the testamentary executor, and the duration of his functions. He may constitute the testamentary executor an administrator of his property, in whole or in part, and may even give him the power to alienate it with or without the intervention of the heir or legatee, in the manner and for the purposes determined by himself.—Poth. Test. 365; N. D. 215 --; 4 Fur. 147; Guy. Exéc. test. 161; 2 Delv. 373, n. [II. 377.]

922. A testator cannot appoint tutors to minors, nor

curators to persons requiring their assistance or to substitutions—If he have assumed to appoint persons to such offices, the specific powers given to the persons thus named, and which he might have conferred upon them without such designation, may however be exercised by them as executors and administrators of the will.—The testator may oblige the heir or the legatee, in certain cases, to take the advice or to obtain the sanction of the testamentary executors, or of other persons. —[II. 379.]

923. The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law.—Author. under a. 921. [II. 379.]

924. [If the testator desire that the appointment or the replacement should be made by the courts or judges, the powers necessary for such purpose may be exercised judicially, the heirs and legatees interested being first duly notified.—When testamentary executors and administrators have been named by the will, and, in consequence of their refusal to accept, or of their powers having ceased without their being replaced, or of unforeseen circumstances, none of them remain, and it is impossible to replace them under the terms of the will, the judges and the courts may likewise exercise the powers necessary to do so, provided it appears that the testator intended the execution and administration of the will to continue independently of the heir or of the legatee.]—[II. 379.]

CHAPTER FOURTH.

OF SUBSTITUTIONS.

SECTION I.

Rules concerning the nature and form of substitutions.

925. There are two kinds of substitution:—Vulgar substitution is that by which a person is called to take the benefit of a disposition in the event of its failure in respect of the person in whose favor it is first made.—Fiduciary substitution is that in which the person receiving the thing is charged to deliver it over to another either at his death or at some other time.—Substitution takes its effect by operation of law at the time fixed upon, without the necessity of any delivery or other act on the part of the person charged to deliver over. — Th. Des. Substit. n. 7, 10, 11, 31, 190, 502, 612-614; 2 Bour. 153-4; Poth. Substit. 485-6 ; Guy. Substit. 453; C. N. 896, 897, 1048. [II. 379.]

926. Fiduciary substitutions include vulgar substitutions without any expressions to that effect being necessary. —Whenever the vulgar is ex-

pressly joined to the fiduciary, to meet particular cases, the substitution is called compendious. — When the term *substitution* is used alone, it applies to the fiduciary, with the vulgar attached to it, unless the nature or terms of the disposition indicate the vulgar alone.—Th. Des. n. 1234 --; O. S. t. 1, a. 27; 2 Bour. 174; Poth. Subst. 485,6; Guy. Subst. 507. [II. 379.]

927. The person charged to deliver over is called the institute, and the one who is entitled to take after him is called the substitute. When there are several degrees in the substitution, the substitute who receives under the obligation of delivering over becomes in turn an institute with regard to the substitute who comes next.—2 Bour. 155-9; Poth. Subst. 486; Guy. Subst. 475, 6. [II. 381.]

928. A substitution may exist although the term *usufruct* be used to express the right of the institute. In general the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words, in order to determine whether there is substitution or not.—Th. Des. n. 259, 263, 269; Poth. Subst. 497, 598; Guy. Subst. 491. [II. 381.]

929. Substitutions may be created by gifts *inter vivos*, made in contracts of marriage or otherwise, by gifts in contemplation of death made in contracts of marriage, or by will.—The capacity of the persons is governed in each case by the nature of the act.—The disposition which creates the substitution may be conditional like any other gift or legacy.—Substitutions may be appended to dispositions that are either universal, or by general title, or by particular title.—The substitute need not be present at the gift *inter vivos* which creates the substitution in his favor; he need not even have been born nor conceived at the time of the act.—Ric. Subst. pt. 1, n. 110, 115; Poth. Subst. 486-8, 523-5-9; Guy. Subst. 482, 496, 497; Th. Des Subst. n. 4, 162-3-6. [II. 381.]

930. Substitutions made by contract of marriage are irrevocable like gifts made in the same manner. — Substitutions made by other gifts *inter vivos* may be revoked by the donor, notwithstanding the acceptance by the institute for himself, [so long as they have not opened; unless they have been accepted by the substitute, or in his behalf, either formally or in an equivalent manner, as in gifts in general.]—The acceptance made for themselves by institutes, even when they are strangers to the donor, also renders irrevocable the substitution in favor of their children born or to be born.—The revocation of a substitution, when it is allowed, cannot prejudice the institute nor his heirs by depriving them of the possible benefit of the lapse of the substitution, or otherwise. On the contrary, and although the substitute might have received but for the revocation, such re-

vocation goes to the profit of the institute and not of the grantor, unless the latter has made a reservation to that effect in the act creating the substitution.—Substitutions by will may be revoked like all other testamentary dispositions. —Ric. Don. pt. 1, n. 850, Substit. pt. 1, n. 137, 140; Th. Des. 1134-8 & *n.* p. 448; O. D. a. 11, 12; C. 772; O. S. t. 1, a. 11, 12; Poth. Subst. 489. [II. 381.]

931. Moveable property as well as immoveables may be the subject of substitutions. Unless corporeal moveables are subjected to a different disposition they must be publicly sold and their price be invested for the purposes of the substitution.—Ready money must also be invested in the same manner.—The investment must in all cases be made in the name of the substitution.—Th. Des. n. 69; O. S. t. 1, a. 3; Blanchet vs. Blanchet, 11 L. C. R. 204; 2 Bour. 158; Poth. Subst. 490-1, 529, 554. [II. 383.]

932. [Substitutions created by will or by gifts *inter vivos* cannot extend to more than two degrees exclusive of the institute.]—Ric. Subst. pt. 2, n. 4; 2 Bour. 171; C. S. L. C. c. 34, s. 2; C. N. 1049. [II. 383.]

933. The rules concerning legacies in general also govern in matters of substitution, in so far as they are applicable, save in excepted cases.—Substitutions by gift *inter vivos*, like those created by will, are subject to the same rules as legacies, as to their opening, and after they have opened. Whatever relates to the form of the act, and the acceptance and prehension of the property by the first donee, remains subject to the rules which belong to gifts *inter vivos*.—An acceptance by the first institute under the gift is sufficient for the substitutes, if they avail themselves of the disposition, and if it have not been validly revoked.—If the gift *inter vivos* lapse in consequence of repudiation or for want of acceptance on the part of the first donee, fiduciary substitution does not take place, nor does the vulgar unless the donor has so provided.—Th. Des. n. 69, 76, 142-144, 159, 161-163, 170-172, 528, 529, 612; Ric. Subst. c. 10, n. 230; 2 Bour. 155-8; Guy. Subst. 482; Poth. Subst. 488, 490, 514; 3 L. C. J. 141, Joseph vs. Castonguay. [II. 383.]

934. The testator may impose a substitution either upon the donee or the legatee whom he benefits, or upon his heir on account of what he leaves him as such. — Poth. Subst. 525; Guy. Subst. 477. [II. 383.]

935. The donor in an act *inter vivos* cannot subsequently create a substitution of the property he has given, even in favor of the children of the donee. —Nor can he reserve the right of doing so, except it be in a contract of marriage. The grantor may however reserve to himself, in all cases, the right to determine the proportions in which the substitutes shall receive. — Nevertheless

the donor or testator may, in a new gift *inter vivos* of other property to the same person, or in a will, create a substitution of the property given unconditionally in the first gift; such a substitution takes effect only by virtue of the acceptance of the subsequent disposition of which it forms a condition, and does not prejudice the rights acquired by third parties.—O. S. t. 1, a. 13, 15; Th. Des. n. 123, 127; C. 824; Poth. Subst. 527. [II. 383.]

936. Children who are not called to the substitution, but are merely named in the condition without being charged to deliver over to others, are not deemed to be included in the disposition.—Ric. Subst. pt. 1, n. 501; 2 Bour. 167; Poth. Subst. 504-7; O. S. 1, a. 19; Th. Des. Subst. n. 939 --. [II. 385.]

937. In substitutions, as in other legacies, representation does not take place, unless the testator has ordained that the property shall pass in the order of legitimate successions, or his intention to that effect is otherwise manifest.—O. S. t. 1, a. 21; Th. Des. n. 64; Ric. Subst. pt. 1, n. 663 --. [II. 385.]

SECTION II.

Of the registration of substitutions.

938. Besides the effect of registration or of the omission to register, as regards gifts and wills respectively as such, any of these acts containing fiduciary substitutions, either in respect of moveable or of immoveable property, must be registered in the interest of the substitutes and of third parties. —Substitutions in the direct line in contracts of marriage, and those in respect of corporeal moveables accompanied with actual delivery to the first donee are not exempt from registration.—The failure to register substitutions operates in favor of third parties, to the prejudice of the substitutes, though the latter be minors, or interdicted, or not yet born, and even against married women, and they cannot be relieved from it; saving their recourse against those whose duty it was to procure the registration.—C. S. L. C. c. 37, s. 29; O. Mou. a. 57; Ric. Subst. pt. 2, n. 120; 2 Bour. 178-180; Poth. Subst. 491 --; C. N. 1069. [II. 385.]

939. The want of registration may be invoked against the substitution by all parties interested who are not within some particular exception.—2 Ric. Subst. pt. 2, n. 120; Poth. Subst. 495, 6; C. N. 941, 1070. [II. 385.]

940. Neither the grantor, nor the institute, nor their heirs or universal legatees, can avail themselves of the want of registration, but it may be invoked by those who have acquired from them in good faith by a particular title, whether onerous or gratuitous, and by their creditors.—Poth. Subst. 495, 6; O. S. t. 2, a. 34; C. N. 941, 1070, 1072. [II. 385.]

941. The registration of acts containing substitutions takes the place of their inscription in the offices of the courts,

and of their judicial publication, which formalities are abolished. — Such registration must be effected within six months from the date of the gift *inter vivos*, or from the death of the testator. The effect of the registration of gifts *inter vivos* within such delay, as regards third parties whose claims are registered, is explained in the title *Of Registration of real rights*. As regards all other parties, and in cases of substitution by will, registration within the same delays has a retroactive effect to the time of the gift, or to that of the death. If it take place subsequently, its effect commences only from its date. —Nevertheless the special delays established, as regards wills, for the cases where the testator dies beyond Canada, or where the deed has been concealed, apply with equal retroactive effect to the substitution contained in the will in such cases.—Substitutions affecting immoveables must be registered in the registry office of the division in which they are situated, and also, when they are created by gifts made in contemplation of death, or by will, at the registry office of the domicile of the grantor. —If it affect moveable property, it must be registered in the registry office of the division in which the donor at the time of the donation, or the testator at the time of his death, had his domicile.—C. S. L. C. c. 37, s. 28, 29; Poth. Subst. 494, 5; O. S. t. 2, a. 27-29; C. 804; C. N. 1069. [II. 385; III. 379.]

942. The following persons are bound to register substitutions, when they are aware of their existence, namely:

1. The institute who accepts the gift or legacy;

2. The substitute of age, who is himself charged to deliver over;

3. Tutors or curators of the institute or of the substitutes, and the curator to the substitution;

4. The husband for his wife who is so bound.—Those who are bound to effect the registration of the substitution, and their heirs and universal legatees, or legatees by general title, cannot avail themselves of the want of such registration.—The institute who has neglected to register is moreover subject to lose the fruits, as in the case of neglect to have an inventory made.—Ric. Subst. pt. 2, n. 130; 2 Bour. 178; O. S. t. 2, a. 23, 30; Poth. S. 494, 496, 553; C. N. 941, 1069, 1070, 1072, 1073. [II. 387.]

943. The acts and declarations of investment of the moneys belonging to the substitution must also be registered within six months from their date.—Author. under a. 942. [II. 387.]

SECTION III.

Of substitutions before their opening.

944. The institute holds the property as proprietor, subject to the obligation of delivering over, and without prejudice to the rights of the

substitute.—Ric. Subst. pt. 1, n. 100; 2 Bour. 186; Poth. Subst. 541, 543, 559; Guy. Subst. 552-3; Th. Des. Subst. n. 11, 631-3. [II. 387.]

945. If all the substitutes be not born, the institute is bound to obtain, in the manner established as regards tutors, the judicial appointment of a curator to the substitution, to represent the substitutes yet unborn, and to attend to their interests in all inventories and partitions and other circumstances in which his intervention is requisite or proper.—The institute who neglects to fulfil this obligation may be declared to have forfeited in favor of the substitute the benefit of the disposition.—All persons who are competent to demand the appointment of a tutor to a minor of the same family may also demand the nomination of a curator to the substitution.—Substitutes who are born but incapable are represented as in ordinary cases.—2 Bour. 160; Guy. Tuteur à Subst. 339; 2 Pi. 313; Th. Des. Subst. c. 88; C. N. 1055, 1056, 1057. [II.387.]

946. The institute is bound, within three months to have an inventory made at his own expense of the property comprised in the substitution, as well as a valuation of the moveable effects, if they have not already been included as such and valued likewise in a general inventory of the property of the succession, made by other persons. All persons interested must either be present or have been notified to that effect.—In default of the institute, the substitutes, their tutors or curators, and the curator to the substitution have the right, and are bound, except the substitutes when they are not obliged to deliver over, to cause such inventory to be made at the expense of the institute, after notifying him, and all others interested, to be present.—So long as the institute fails to have such inventory and valuation made he is deprived of the fruits.—2 Bour. 160; Poth. Subst. 522, 3; 2 Pi. 313; Guy. Tut. à subst. 339; O. S. t. 2, a. 1, 2, 4, 5; C. N. 1058, 1059, 1060. [II. 387.]

947. The institute performs all the acts that are necessary for the preservation of the property.—He is liable on his own account for all rights, rents, charges and arrears falling due within his time.—He makes all payments, receives moneys due and reimbursements, invests capital sums and exercises before the courts all the powers necessary for these purposes.—For the same purposes he makes the necessary advances for law expenses and other necessary disbursements of an extraordinary nature, the amount of which is refunded to him or his heirs, either in whole or in part, according to what appears to be equitable at the time when he delivers over.—If he have redeemed rents or paid the principal of debts due, without having been charged to do so, he and his heirs have a right to be paid back, at the same

time, the moneys so disbursed, without interest.—If such redemption or payment have been made in anticipation without sufficient reason, and would not have been demandable at the time of the opening, the substitute need not, until the time when they would have become exigible, do more than pay the rents or interest.—2 Bour. 160-3; Poth. Subst. 541, 2; Guy. Subst. 522 --. [II. 389.]

948. The rules concerning indivision set forth in the title *Of Successions*, apply equally to substitutions, save the provisional nature of the partition while they last.—In the case of forced sale of immoveables, or any other lawful alienation of the property comprised in a substitution, and in the case of redemption of rents or capital sums, the institute, or the testamentary executors authorized to administer in his place, are bound to invest the price, in the interest of the substitutes, with the consent of all parties interested; or upon the refusal of such parties, the investment is made under judicial authorization, obtained after due notice to them being given.—2 Bour. 160; Poth. Subst. 542, 543, 552; Guy. Subst. 527. [II. 389.]

949. The obligation of delivering over the property of the substitution in an undiminished state, and the nullity of all his acts in contravention thereof, do not prevent the institute from hypothecating or alienating such property, without prejudice to the rights of the substitute, who takes it free from all hypothecs, charges or servitudes, and even from the continuation of lease, unless his right has been prescribed according to the rules contained in the title *Of Prescription*, or unless a third party has a right to avail himself of the want of registration of the substitution.—Author. under a. 951. [II. 389.]

950. Forced sales under execution, or by licitation, are likewise dissolved in favor of the substitute by the opening of the substitution, if it have been registered, unless the sale comes within one of the cases mentioned in article 953.—Author. under a. 951. [II. 589.]

951. The institute cannot compound as to the ownership of the property in such a manner as to bind the substitute, except in cases of necessity, when the interests of the latter are concerned, and after being judicially authorized in the manner required for the sale of property belonging to minors.—Ric. Subst. pt. 2, n. 90; Poth. Subst. 543; Guy. Transaction, 236; O. S. t. 2, a. 53; Th. Des. Subst. 788, 857 --. [II. 389.]

952. The grantor may indefinitely allow the alienation of the property of the substitution, which takes place, in such case, only when the alienation is not made.—Ric. Subst. pt. 2, n. 76; Poth. Subst. 537; Guy. Subst. 507; Th. Des. Subst. n. 787. [II. 391.]

953. The final alienation of the property of a substitution

may moreover be validly effected while the substitution lasts:

1. By expropriation for public purposes or in virtue of some special law;

2. By forced judicial sale on account of a debt due by the grantor, or of hypothecary claims anterior to his possession. The obligation of the institute to discharge the debt or hypotheo does not prevent the sale from being valid in this case against the substitution, but the institute is liable towards the substitute for all damages;

3. With the consent of all the substitutes, when they are in the exercise of their rights. If some of them only have consented, the alienation holds good as regards them, without prejudicing the others;

4. When the substitute as heir or legatee of the institute is answerable to the purchaser for the eviction;

5. As regards moveable things sold in conformity with section 1 of this chapter.—Ric. Subst. c. 6, n. 258, c. 13, n. 99 --; 2 Bour. 160, 179, 189 --; Poth. Subst. 531, 533, 534, 548; Guy. Subst. 527 --; Hér. 49. [II. 391.]

954. [The wife of the institute has no subsidiary recourse against the property of substitutions for the securing of her dower or her dowry.] —C. N. 1054. [II. 391.]

955. If the institute deteriorate, waste or dissipate the property, he may be compelled to give security or to allow the substitute to be put in possession of it as a sequestrator.—Ric. Subst. c. 10, n. 25, 26; 2 Bour. 160; Poth. Subst. 552; Guy. Subst. 536; Th. Des. Subst. n. 780-782. [II. 391.]

956. The substitute may, while the substitution lasts, dispose by act *inter vivos* or by will, of his eventual right to the property of the substitution, subject to the contingency of its lapsing, and to its ulterior effects if it continue beyond him.—The substitute or his representatives may, before the opening, perform all acts of a conservatory nature connected with his eventual right, whether against the institute or against third persons.—Ric. Subst. c. 13, n. 89; Poth. Subst. 551,2; Th. Des. Subst. n. 757. [II. 391.]

957. The substitute who dies before the opening of the substitution in his favor, or whose right to it has otherwise lapsed, does not transmit such right to his heirs, any more than in the case of any other unaccrued legacy.—2 Bour. 173; Poth. Subst. 550; Th. Des. Subst. n. 510 --, 556 --. [II. 391.]

958. As regards the repairs which the institute is bound to make, and the reimbursements he or his heirs may claim for the improvements he has made, the same rules apply as are laid down for the emphyteutic lessee in articles 581 and 582. —Poth. Subst. 534. [II. 391.]

959. Judgments obtained by third parties against the institute cannot be impugned by the substitutes, on the ground of the substitution, if, in the

same suits, they, or their tutors or curators, or the curator to the substitution, besides the executors and administrators of the will, if there were any in function, were impleaded.—If the substitutes, or those who may be thus impleaded in their place, have not been included in the suit, such judgments may be impugned, whether the institute has or has not contested the action brought against him.—Del. 22 Mar. 1732, 1 Ed. & O. 533; Guy. Subst. 545; Th. Des. Subst. n. 1258; 2 Pi. 407. [II. 393.]

960. The institute may, but without prejudice to his creditors, deliver over the property in anticipation of the appointed term, unless the delay is for the benefit of the substitute.—O. Subst. t. 1, a. 42; Th. Des. Subst. n. 1044--; Ric. Subst. pt. 2, n. 27, 40, 48; 2 Bour. 171; Poth. Subst. 556,7; Guy. Subst. 537. [II. 393.]

SECTION IV.

Of the opening of substitutions and the delivering over of the property.

961. When no period is assigned for the opening of a substitution and the delivering over of the property, they take place at the death of the institute.—Ric. Subst. pt. 2, n. 27; 2 Bour. 171; Poth. Subst. 555; C. N. 1053. [II. 393.]

962. The substitute takes the property directly from the grantor and not from the institute.—The substitute, by the opening of the substitution in his favor, becomes immediately seized of the property in the same manner as any other legatee; he may dispose of it absolutely and transmit it in his succession, if he be not prohibited from doing so, or if the substitution do not continue beyond him.—2 Bour. 172; Guy. Subst. 538; Poth. Subst. 559. [II. 393.]

963. If, by reason of a pending condition or some other disposition of the will, the opening of the substitution do not take place immediately upon the death of the institute, his heirs and legatees continue, until the opening, to exercise his rights, and remain liable for his obligations. — Poth. Subst. 563; Th. Des. Subst. c. 30. [II. 393.]

964. The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor subject to deliver over, rather than that of a mere executor or administrator, does not retain the property in the event of the lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession.—Ric. Subst. pt. 1, n. 752-4; Th. Des. Subst. n. 536, 439. [II. 393.]

965. The institute or his heirs deliver over the property together with its accessories;

they render the fruits and interest accrued since the opening, if they have received them, unless the substitute, after being put in default to accept or repudiate the legacy, has failed to assume his quality.—Poth. Subst. 560; Guy. Subst. 539; Th. Des. Subst. c. 69. [II. 393.]

966. [If the institute were a debtor or a creditor of the grantor, and in consequence of his accepting as heir, as universal legatee, or as legatee by general title, confusion take place so as to destroy his debt or his claim, such debt or claim, notwithstanding such confusion which is deemed to be only temporary, revives between the substitute and the institute or his heirs, when the property comes to be delivered over; except as to interest up to that time for which the confusion still holds.—The institute or his heirs are entitled to the separation of property in the prosecution of their claim, and may retain the property until they are paid.]—Guy. Subst. 540; Th. Des. Subst, c. 53-56; Ric. Subst. c. 12, n. 71; 2 Bour. 161. [II. 395.]

967. Institutes under age, interdicted, or unborn, or under coverture, are not relievable from the non-fulfilment of the obligations imposed upon them, or upon their husbands, tutors or curators for them, by this and the preceding section; saving their recourse. —2 Ric. Subst. pt. 2, n. 133-4; Poth. Subst. 496; C. N. 1074. [II. 395.]

SECTION V.

Of the prohibition to alienate.

968. The prohibition to alienate contained in a deed may, in certain cases, be connected with a substitution or may even constitute one.—It may also be made for other motives than that of substitution.—It may be stated in express terms, or may result from the conditions and circumstances of the act.—It includes the prohibition to hypothecate.—In gifts *inter vivos* the undertaking by the donee not to alienate has the same effects as the prohibition by the donor.—ff. L. 134, de leg. 1; L. 38, Ib. 3; Cod. L. 4, de cond. ob caus.; Ric. Subst. pt. 1, n. 333 --, 369; 3 Hen. l. 5, c. 4, q. 49; 2 Bour. 164; Dom. Subst. t. 3, s. 2, n. 5, & l. 5, i. p., Legs, t. 2, s. 1, n. 3; N. D. Défense d'aliéner, § 1; Poth. Subst. 499. [II. 395.]

969. The cause or consideration of the prohibition to alienate, may be the interest either of the party disposing, or of the party receiving, or it may be that of the substitutes, or of third parties. —12 Poth. Pand. 245-252; Ric. Subst. pt. 1, n. 333; Poth. Don. pt. 1, n. 1044. [II. 395.]

970. The prohibition to alienate things sold or conveyed by purely onerous title is void.—N. D. Défense d'aliéner, § 1, n. 1. [II. 395.]

971. The prohibition to alienate may be simply confirmatory of a substitution.—It may constitute one, although express terms be not used, ac-

cording to the rules hereinafter laid down. [II. 395.]

972. [Although the motive of the prohibition to alienate be not expressed, and it be not declared under pain of nullity or some other penalty, the intention of the party disposing suffices to give it effect, unless the expressions are evidently within the limits of mere advice. —When the prohibition is not made for another motive, it is interpreted as establishing in favor of the party disposing and his heirs a right to get back the property.]—N. D. l. c. n. 3. [II. 397.]

973. If the prohibition to alienate be made in favor of persons who are designated, or who may be ascertained, and who are to receive the property after the donee, the heir, or the legatee, a substitution is created in favor of such persons, although it be not in express terms.—Poth. Subst. 449, 517, 518. [II. 397.]

974. When the prohibition to alienate extends to several degrees and is at the same time interpreted as implying a substitution, those to whom the prohibition successively applies after the first who receives, become substitutes in turn, as if they were the subject of express dispositions. — 2 Ric. Subst. pt. 1, n. 397-9. [II. 397.]

975. The prohibition to alienate may be confined to acts *inter vivos*, or to acts in contemplation of death, or may extend to both, or may be otherwise modified according to the will of the party disposing. Its extent is determined according to the object which the party disposing had in view, and the other attending circumstances.—If there be no restriction, the prohibition is deemed to cover acts of every description.—2 Ric. Subst. pt. 1, n. 340 --. [II. 397.]

976. The simple prohibition to dispose of property by will, without other condition or indication, implies a substitution in favor of the natural heirs of the donee, or of the heir or legatee, for so much of the property as may remain at the death of such donee, heir or legatee. — Poth. Subst. 518. [II. 397.]

977. The prohibition to alienate out of the family, either of the party disposing or of the party receiving, or out of any other family, does not, in the absence of expressions denoting continuance, extend to others than those to whom it is addressed; the persons belonging to the family who take after them are not subject to it.—If the prohibition be addressed to no person in particular, it is deemed, in the absence of such expressions, to apply only to the person first benefited.—Substitutions made in a family are in all cases interpreted according to the same rules.—Ric. Subst. pt. 1, n. 388, 393, 516; Th. Des. Subst. n. 356, 357, 358--, 363 --, 953-959. [II. 397.]

978. The prohibition to alienate out of the family, when no dispositions require the following of the legitimate order of succession, or any

other order, does not prevent the alienation, by gratuitous or onerous title, made in favor of the more distant members of the family.—Th. Des. l. c. [II. 397.]

979. The term *family* when it is not limited, applies to all the relatives in the direct or collateral line belonging to the family, who come by successive degrees according to law or to the order indicated, without however representation being allowed otherwise than in the case of legacies.—O. S. t. 1, a. 21, 22; Poth. Subst. 512-514. [II. 399.]

980. In the prohibition to alienate, as in substitutions, and in gifts and legacies in general, the terms *children* or *grandchildren*, made use of without qualification either in the disposition or in the condition, apply to all the descendants, with or without the effect of extending to more than one degree according to the terms of the act.—Ric. Subst. pt. 1, n. 503 --; Th. Des. Subst. n. 367 --; Poth. Subst. 509; 7 L. C. R. 351; 9 Id. 376; 11 Id. 84, Martin & Lee; 6 Guy. 718 --. [II. 399.]

981. [Prohibitions to alienate, although not accompanied by substitution, must be registered, even as regards moveable property, in the same manner as substitutions themselves.—The person thus prohibited and his tutor or curator, and the husband in the case of a married woman, are bound to effect such registration.]—[II.399.]

TITLE THIRD.

OF OBLIGATIONS.

GENERAL PROVISIONS.

982. It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object.—Poth. Ob. n. 1. [I. 37.]

983. Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely.—Inst. l. 3, t. 14, § 1, 2; Poth. Ob. 2. [I. 37.]

CHAPTER FIRST.

OF CONTRACTS.

SECTION I.

Of the requisites to the validity of contracts.

984. There are four requisites to the validity of a contract:—Parties legally capable of contracting;—Their consent legally given;—Something which forms the object

of the contract;—A lawful cause or consideration.—ff. L. 1, § 2, 3, L. 7, § 4, De pact.; Poth. Ob. 2; Dom. l. 1, t. 1, s. 2-5 --; C. N. 1108; C. L. 1772. [I. 37.]

§ 1. *Of the legal capacity to contract.*

985. All persons are capable of contracting, except those whose incapacity is expressly declared by law.—Dom. l. 1, t. 1, s. 2, § 1; ff. L. 1, De pact.; C.N. 1123. [I. 37.]

986. Those legally incapable of contracting are:—Minors in the cases and according to the provisions contained in this code.—Poth. Ob. 52; Dom. l. 1, t. 1, s. 5, n. 4 --, & *n.*; 4 Boi. 374-6.—Interdicted persons.—ff. L. 40, De reg. jur.; Poth. Ob. 50; Dom. l. 1, t. 2, s. 2, § 10.—Married women, except in the cases specified by law.—Poth. Ob. 50; C. P. 223, 234.—Those who, by special provisions of law, are prohibited from contracting by reason of their relation to each other, or of the object of the contract;—Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or other cause, or who by reason of weakness of understanding are unable to give a valid consent.—Dom. l. 1, t. 2, s, 1, § 11; Poth. Ob. 51, 49; ff. L. 40, De reg. jur.;—Persons civilly dead;—Dom. l. prél. t. 2, s. 2, § 12, 13; C. N. 1124; 3 Sav. 90. [I. 37.]

987. The incapacity of minors and of persons interdicted for prodigality, is established in their favor.—Parties capable of contracting cannot set up the incapacity of the minors or of the interdicted persons with whom they have contracted.—Dom. l. 1, t. 1, s. 5, § 7; Id. l. 2. t. 1, s. 2, n. 10; ff. L. 13, § 29, De act. emp. & vend.; ff. L. 6, L. 7, L. 44, De min.; Poth. Ob. 52; Mes. c. 14, n. 28; ff. L. 5, § 1, L. 9, i. p. De auc. et cons. tut.; C. N. 1125. [I. 39.]

§ 2. *Of consent.*

988. Consent is either express or implied. It is invalidated by the causes declared in the second section of this chapter. — Poth. Ob. 16, 17. [I. 39.]

§ 3. *Of the cause or consideration of contracts.*

989. A contract without a consideration, or with an unlawful consideration has no effect; but it is not the less valid though the consideration be not expressed or be incorrectly expressed in the writing which is evidence of the contract. ff. L. 7, § 4, 7; L. 27, § 4 De pac.; Poth. Ob. 42, 43, 753; ff. L. 26, § ult. De prob. 23, 3; Dom. l. 1, t. 1, s. 5, n. 13; Id. l. c. s. 1, n. 5, 6; 6 Toul. n. 175-- ; 4 Marc. n. 456; C. N. 1131, 1132; [I, 39; III. 381.]

990. The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order.—ff. L. 7, § 7, De pact.; Poth. 43; C. N. 1133. [I. 39.]

§ 4. *Of the object of contracts.*

See Chap. V. "Of the object of obligations."

SECTION II.

Of causes of nullity in contracts.

991. Error, fraud, violence or fear, and lesion are causes of nullity in contracts; subject to the limitations and rules contained in this code. [I. 39.]

§ 1. *Of error.*

992. Error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the thing which is the object of the contract, or in some thing which is a principal consideration for making it.—Poth. Ob. 17, 18; ff. L. 116, § 2, de reg. jur. L. 57, De obl. & act.; C. N. 1110. [I. 39.]

§ 2. *Of fraud.*

993. Fraud is a cause of nullity when the artifices practised by one party or with his knowledge are such that the other party would not have contracted without them.—It is never presumed and must be proved.—Poth. Ob. 29, 31, 32; Dom. l. 1, t. 18, s. 3, n. 1, 3, Id. t. 1, s. 6, n. 8; ff. L. 7, § 9, dolo.; C. N. 1116. [I. 41.]

§ 3. *Of violence and fear.*

994. Violence or fear is a cause of nullity, whether practised or produced by the party for whose benefit the contract is made or by any other person.—Dom. l. 4, t. 6, s. 3, n. 1; ff. L. 1, 2, 3, 21, § 5, Q. met. causâ; L. 116, i. p. De reg. jur.; Dom. l. 1, t. 1, s. 5, n. 10; Poth. Ob. 21-23; C. N. 1109, 1111. [I. 41.]

995. The fear whether produced by violence or otherwise must be a reasonable and present fear of serious injury. The age, sex, character and condition of the party are to be taken into consideration.—ff. L. 5, L. 6, L. 9, Q. met. causâ, L. 184, De reg. jur.; Poth. Ob. 25; 4 Marc. n. 411; C. N. 1112. [I. 41.]

996. Fear suffered by a contracting party is a cause of nullity whether it is a fear of injury to himself, or to his wife, children or other near kindred, and sometimes when it is a fear of injury to strangers, according to the circumstances of the case.—ff. L. 8, § 3, Q. met. causâ.; Poth. Ob. 25; 4 Marc. n. 413; 10 Dur. n. 152; C. N. 1113. [I. 41.]

997. Mere reverential fear of a father or mother, or other ascendant, without any violence having been exercised or threats made, will not invalidate a contract.—Poth. Ob. 27; C. N. 1114. [I. 41.]

998. If the violence be only a legal constraint, or the fear only of a party doing that which he has a right to do, it is not a ground of nullity; but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort a consent.—Poth. Ob. 26; ff. L. 3, § 1, Q. met. causâ; C. L. 1850, 1851. [I. 41.]

999. A contract for the

purpose of delivering the party making it, or the husband, wife or near kinsman of such party from violence or threatened injury, is not invalidated by reason of such violence or threats; provided the person in whose favor it is made be in good faith, and not in collusion with the offending party.—ff. L. 9, § 1, Q. met. causâ; Poth. Ob. 24; C. L. 1852; 4 Marc. n. 415. [I. 41.]

1000. Error, fraud, and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.—Poth. Ob. 29; Author. under a. 993; C. N. 1117. [I. 43.]

§ 4. *Of lesion.*

1001. Lesion is a cause of nullity only in certain cases and with respect to certain persons, as explained in this section.—C. N. 1118. [I. 43.]

1002. Simple lesion is a cause of nullity in favor of an unemancipated minor against every kind of act when not aided by his tutor, and when so aided, against every kind of act other than acts of administration; and in favor of an emancipated minor against all contracts which exceed his legal capacity, as established in the title *Of Minority, Tutorship and Emancipation*; subject to the exceptions specially expressed in this code.—Poth. Ob. 40; Dom. l. 4, t. 6, s. 2, n. 19, 23, 24; Id. l. 2, t. 1, s. 3, n. 16; Cod. L. 2, Si tut. v. cur. int.; ff. L. 7, § 3, 5, 7, L. 29, L. 34, § 1; L. 49 De min.; Mes. c. 14, n. 27; C. N. 1305. [I. 43.]

1003. The simple declaration made by a minor that he is of the age of majority forms no bar to his obtaining relief for cause of lesion.—Dom. l. 4, t. 6, s. 2, n. 7; Mes. c. 14, n. 55, p. 410, 411; Cod. L. 1, Si min. se maj. dix.; C. N. 1307. [I. 43.]

1004. A minor is not relievable for cause of lesion, when it results only from a casual and unforeseen event.—ff. L. 11, § 4, De min.; Mes. 391, 14, n. 18; Dom. l. 4, t. 6, s. 2, n. 15; C. N. 1306. [I. 43.]

1005. A minor who is a banker, trader or mechanic is not relievable for cause of lesion from contracts made for the purposes of his business or trade.—Mes. 14, n. 53; Guy. Mineurs, 528; O. 1673, t. 1, a. 6; C. N. 1308. [I. 43.]

1006. [A minor is not relievable from the stipulations contained in his marriage contract, when they have been made with the consent and assistance of those whose consent is required for the validity of his marriage.]—Mes. c. 14, n. 42; 7 Toul. n. 584; C. N. 1309. [I. 45.]

1007. A minor is not relievable from obligations resulting from his offences and quasi-offences.—ff. L. 37, § prel.; L. 9, § 2, De min.; Cod. L. 1, Si adv. del.; Mes. c. 14, n. 54; Dom. l. 4, t. 6, s. 2, n. 5, 6; C. N. 1310. [I. 45.]

1008. A person is not relievable from a contract made by him during minority, when

he has ratified it since attaining the age of majority.—Mes. 14, n. 56; Dom. l. 4, t. 6, s. 2, n. 31, 32; C. N. 1311. [I. 45.]

1009. Contracts by minors for the alienation or incumbrance of their immoveable property made with or without the intervention of their tutors or curators, unattended with the formalities required by law, may be avoided without proof of lesion.—Cod. L. 11, de praed. & al. reb.; Poth. Vente, n. 14, 168, 516; Dom. l. 4, t. 6, s. 2, n. 26. [I. 45.]

1010. [When all the formalities required with respect to minors or interdicted persons for the alienation of immoveable property, or the partition of a succession, have been observed, such contracts, and acts have the same force and effect as if they had been executed by persons of the age of majority and free from interdiction.] —Cod. L. 2, Si tut. v. cur. interv.; ff. L. 29, De min.; L. 7, § 3, Pro emp.; Dom. l. 2, t. 1, s. 2, n. 10, Id. l. 4, t. 6, s. 2, n. 23, 24; Mes. c. 14; 2 Hen. 257, n. 1, 2; C. N. 1314; C. L. 1862; 4 Marc. on a. 1314. [I. 45]

1011. When minors, interdicted persons or married women are admitted in these qualities to be relieved from their contracts, the reimbursement of that which has been paid in consequence of these contracts, during the minority, interdiction or marriage, cannot be exacted, unless it is proved that what has been so paid has turned to their profit. —Mes. 14, n. 25; 7 Toul. 580; C. N. 1312. [I. 45.]

1012. [Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.]—C. N. 1313. [I. 47.]

SECTION III.

Of the interpretation of contracts.

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.—ff. L. 219, De verb. sig.; Poth. Ob. 91; Dom. l. 1, t. 1, s. 2, n. 8; C. N. 1156. [I. 47.]

1014. When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none.—ff. L. 80, De verb. ob.; Poth. 92; C. L. 1946; C. N. 1157. [I. 47.]

1015. Expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract.—ff. L. 67, De reg. jur.; Poth. 93; C. L. 1947; C. N. 1158. [I. 47.]

1016. Whatever is doubtful must be determined according to the usage of the country where the contract is made.—ff. L. 34, De reg. jur.; Poth. 94; Dom. l. 1, t. 1, s. 2, n. 9; C. L. 1948; C. N. 1159. [I. 47.]

1017. The customary clauses must be supplied in contracts, although they be not expressed.—ff. L. 31, § 20, De

Aed. edict.; Poth. 95; C. L. 1949; C. N. 1160. [I. 47.]

1018. All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.—ff. L. 24, De leg.; L. 126. De verb. sig.; Poth. 96; Dom. l. 1, t. 1, s. 2, n. 10; C. L. 1950; C. N. 1161. [I. 49.]

1019. In cases of doubt, the contract is interpreted against him who has stipulated and in favor of him who has contracted the obligation.—ff. L. 38, § 18, De verb. ob. L. 99; L. 26, De reb. dub.; Poth. 97; Dom. l. 1, t. 1, s. 2, n. 13; C. L. 1952; C. N. 1162. [I. 49.]

1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.—ff. L. 3, § 2, L. 5, L. 9, §, 3, L. 12, De transac.; Poth. 98, 99; Dom. l. 1, t. 1, s. 2, n. 21; C. L. 1954; C. N. 1163. [I. 49.]

1021. When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified.—ff. L. 81, De reg. jur. L. 56, Mand. vel. cont.; Poth. 100; C. L. 1957; C. N. 1164. [I. 49.]

SECTION IV.

Of the effect of contracts.

1022. Contracts produce obligations, and sometimes have the effect of discharging or modifying other contracts.—They have also the effect in some cases of transferring the right of property.—They can be set aside only by the mutual consent of the parties, or for causes established by law.—Poth. Ob. 85; ff. L. 1, t. 1, s. 3, n. 12, s. 2, n. 7; C. N. 1134. [I. 49.]

1023. Contracts have effect only between the contracting parties; they cannot affect third persons, except in the cases provided in the articles of the fifth section of this chapter.—ff. De pact. L. 27, § 3; Poth. Ob. 85, 87-89; C. N. 1165. [I. 49.]

1024. The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.—ff. L. 2, § 3, De ob. & act.; ff. L. 35, De reg. jur.; Cod. l. 4, t. 10, 4, De ob. & act.; Dom. l. c.; C. N. 1135. [I. 49.]

1025. [A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made.—The foregoing rule is subject to the special provisions contained in this code concerning the transfer and registry of vessels. The safekeeping and risk of the thing before delivery are subject to the general rules contained in the chapters *Of the effect of obligations* and *Of the extinction of obligations* in this title.]—ff.

L. 35, § 5, De cont. empt.; Poth. Vente, 308, 309; 6 Toul. n. 202, 204; 7 Toul. n. 34, 231, 460; C. O. a. 278; C. L. 1903; C. N. 1583. [I. 51; III. 381.]

1026. If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so.—Poth. Vente, 309, 310; 7 Toul. n. 460; 6 Toul. n. 202 *n.*; C. L. 1903. [I. 51.]

1027. [The rules contained in the two last preceding articles, apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special provisions contained in this code for the registration of titles to and claims upon such property. —But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date; provided, however, that his possession be in good faith.]—Cod. L. 15, De rei vind.; Poth. Ob. 151, 152; Vente, 318, 319; 6 Toul. n. 204, 205; C. L. 1914, 1916; C. N. 1141. [I. 51.]

SECTION V.

Of the effect of contracts with regard to third persons.

1028. A person cannot, by a contract in his own name, bind any one but himself and his heirs and legal representatives; but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated.—Inst. l. 3, t. 19, § 19, 20; ff. L. 73, § 4, De reg. jur.; ff. L. 81, De verb. ob., L. 38, § 2; Poth. 53, 56; C. N. 1119, 1120. [I. 51.]

1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.—ff. L. 38, § 20, 21, 23, De verb. ob.; Poth. 70, 73; C. N. 1121. [I. 51.]

1030. A person is deemed to have stipulated for himself, his heirs and legal representatives, unless the contrary is expressed, or result from the nature of the contract.—ff. L. 143, De reg. jur.; ff. L. 56, § 1, L. 38, § 14, De verb. ob.; Poth. 63-70; C. N. 1122. [I. 53.]

1031. Creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so; with the exception of those rights which are exclusively attached to the person.—ff. L. 134, De reg. jur. L. 6, Q. in fraud.; Leb. Suc. l. 2, c. 2, s. 2, n. 42, 43, p. 214; 6 Toul. n. 369, 370; Dom. l. 2, t. 10, Intr. s. 1, n. 8; C. N. 1166. [I. 53.]

SECTION VI.

Of the avoidance of contracts and payments made in fraud of creditors.

1032. Creditors may in their own name impeach the acts of their debtors in fraud of their rights, according to the rules provided in this section.—ff. L. 1, § 1, 2, Q. in fraud. cred.; N. D. Fraude rel. aux créanciers, § 2, n. 2; 6 Toul. n. 343--, 354, 366; O. C. 1673, t. 11, a. 4; R. Lyon, 1667; Del. 1702; 2 Bor. 698; E. 1609; C. N. 1167. [I. 53.]

1033. A contract cannot be avoided unless it is made by the debtor with intent to defraud, and will have the effect of injuring the creditor.—ff. L. 15, Q. in fraud. cred.; Dom. l. 2, t. 10, s. 1, n. 6; N. D. v. c. § 2, n. 9; 6 Toul. n. 348-352; C. L. 1973. [I. 53.]

1034. A gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it.—ff. L. 6, § 2, l. c.; Dom. l. c. n. 2; N. D. v. c, § 1, n. 10; Poth. 153; 6 Toul. 353, 354; C. L. 1975. [I. 53.]

1035. An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.—ff. L. 1, L. 6, § 8, Q. in fraud. cred.; Dom. l. c. n. 4; N. D. l. c. n. 12, 15; 6 Toul. n. 342-366. [I. 53.]

1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.—ff. l. c. L. 10, § 12; N. D. l. c.; ff. L. 6, § 6, Q. in fraud. cred.; Jou. O. 1673, t. 11, a. 4, n. 1; Savary, P. 39, p. 312, 319 & 310.; 6 Toul. l. c.; Bor. O. C. t. 11, a. 4, p. 698 (673 in later ed.); Toub. l. 3, t. 12, c. 3, p. 730; C. Co. a. 446, 447 & *n.* by De Vil. D. C. C. 744, 745 & Rog. 878 --; C. L. 1983. [I. 55; III. 381.]

1037. Further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency are contained in The Insolvent Act of 1864. [I. 55; III. 381.]

1038. An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts is not voidable; saving the special provisions applicable in cases of insolvency of traders.—L. 6, § 8, l. c. a. 1035; Poth. 153; Dom. n. 3, l. c.; N. D. l. c. n. 11; 6 Toul. n. 352; C. L. 1974. [I. 55; III. 381.]

1039. No contract or payment can be avoided, by reason of any thing contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor; saving, nevertheless, the exception contained in The Insolvent Act of 1864.—ff. L. 10, § 1, Q. in fraud. cred.; 9 N. D. v. c. § 3, n. 1-3, p. 84, 85; Dom. l. c.

n. 6; 6 Toul. n. 351; C. L. 1988. [I. 55; III. 381.]

1040. [No contract or payment can be avoided by reason of any thing contained in this section, at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof.—If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointment.]—ff. L. 1, Q. in fraud. cred. L. 6, § 14; 6 Toul. n. 356; C. L. 1989. [I. 55; III. 381.]

CHAPTER SECOND.

OF QUASI-CONTRACTS.

1041. A person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them. —Inst. l. 3, t. 27; Poth. 113-115; 5 Marc. 249; C. N. 1371. [I. 57.]

1042. A person incapable of contracting may, by the quasi-contract which results from the act of another, be obliged toward him.—Poth. Ob. 115, 128; 5 Marc. 259. [I. 57.]

SECTION I.

Of the quasi-contract negotiorum gestio.

1043. He who of his own accord assumes the management of any business of another, without the knowledge of the latter, is obliged to continue the management which he has begun, until the business is completed or the person for whom he acts is in a condition to provide for it himself: he must also take charge of the accessories of such business.—He subjects himself to all the obligations which result from an express mandate.—Inst. l. 3, t. 27, § 1; ff. l. 3, t. 5, L. 2, 3, 6, 32; Poth. Ob. 115; Id. Mand. 29, 180, 201; Dom. l. 2, t. 4, s. 1, n. 1, 2; Tr. Mand. 70-72; 5 Marc. 250, on a. 1372; 1 Toul. n. 25 --; C. N. 1372. [I. 57.]

1044. He is obliged to continue his management although the person for whom he acts die before the business is terminated, until such time as the heir or other legal representative is in a condition to take the management of it. —ff. l. c. L. 21; Poth. Mand. 201; C. N. 1373. [I. 57.]

1045. He is bound to exercise in the management of the business all the care of a prudent administrator.—Nevertheless the court may moderate the damages arising from his negligence or fault, according to the circumstances under which the management of the business has been assumed.—ff. t. c. L. 11, L. 3, § 9; Poth. Mand. 208, 211; Dom. l. 2, t. 4, s. 1, n. 2, 12; C. N. 1374. [I. 57.]

1046. He whose business has been well managed is bound to fulfil the obligations that the person acting for him has contracted in his name, to indemnify him for all the personal liabilities

which he has assumed, and to reimburse him all necessary or useful expenses.—ff. l. c. L. 2, 21, 45; Poth. Ob. 112, 115, 221, 223, 224, 228; Dom. l. 2, t. 4, s. 2, n. 2-4; C. N. 1375. [I. 57.]

SECTION II.

Of the quasi-contract resulting from the reception of a thing not due.

1047. He who receives what is not due to him, through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it.—[If the person receiving be in good faith, he is not obliged to restore the profits of the thing received.]—13 Dur. 601-2-4; 11 Toul. 94; Inst. l. 3, t. 27, L. 6, § 7; ff. § 3, L. 5, De ob. & act.; L. 1, 2, § 1; L. 7, 37, 54, De cond. indeb.; L. 9, § 5, De ju. & fac. ignor.; Cod. L. 10, c. t.; Poth. Prêt C. 132, 140, 165, 168; Dom. l. 2, t. 7, s. 1, n. 1, 5, s. 3, n. 3, 4, *n.*; C. N. 1376. [I. 59.]

1048. He who pays a debt believing himself by error to be the debtor, has a right of recovery against the creditor.—Nevertheless that right ceases when the title has in good faith been cancelled or has become ineffective in consequence of the payment; saving the remedy of him who has paid against the true debtor.—ff. L. 65, § fin. Cond. indeb.; Poth. Ob. 113; Id. Prêt C. 153; Dom. l. 2, t. 7, s. 1, n. 2; C. N. 1377. [I. 59.]

1049. If the person receiving be in bad faith he is bound to restore the sum paid or thing received, with the interest and profits which it ought to have produced from the time of receiving it, or from the time that his bad faith began.—ff. L. 65, § 5; L. 15, De cond. indeb.; Poth. Prêt C. 168; Dom. l. 3, t. 5, s. 3, n. 4, & l. 2, t. 7, s. 3, n. 1; C. N. 1378. [I. 59.]

1050. If the thing unduly received be a thing certain, he who has received it is bound to restore its value, if through his fault and his bad faith it have perished or deteriorated, or can no longer be delivered in kind.—If he have received the thing in bad faith, or after having been put in default retain it in bad faith, he is answerable for its loss by a fortuitous event; unless the thing would have equally perished or deteriorated in the possession of the owner.—ff. L. 62, i. p. § 1; L. 15, § 3, De rei vind. L. 31, § 3, De her. pet.; Poth. Prêt C. 172, 174; Dom. l. 2, t. 7, s. 3, n. 2; Marc. 258, 259; C. N. 1379. [I. 59.]

1051. If he who has unduly received the thing sell it, being in good faith, he is bound to restore only the price for which it is sold.—ff. L. 26, § 12, De cond. indeb.; Poth. 173; Dom. l. 2, t. 7, s. 3, n. 5; C. N. 1380. [I. 61.]

1052. He to whom the thing is restored, is bound to repay to the possessor, although he were in bad faith, the expenses which have been incurred for its preservation.—ff. L. 13, § 1, L. 14, De cond. indeb., L. 6, §

3, De neg. gest., L. 38, De hered. pet.; Poth. Prop. 343-345; Dom. l. 2, t. 7, s. 4; 4 Marc. 262; C. N. 1381. [I. 61.]

CHAPTER THIRD.

OF OFFENCES AND QUASI-OFFENCES.

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill—ff. L. 1, De inj. L. 5, § 1, L. 9, § ult., L. 10, Ad. leg. Aq.; Dom. l. 3, t. 5, s. 2, n. 9, L. 2, t. 8, s. 4; 11 Toul. 319 --; 5 Marc. 264-266; 4 Zach. § 624, *n.* 2; § 625, *n.* 14, & § 626-628; C. N. 1382, 1383. [I. 61.]

1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;—The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;—Tutors are responsible in like manner for their pupils;—Curators or others having the legal custody of insane persons, for the damage done by the latter;—Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.—The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.—Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.—ff. L. 1, § 1, Si fam. fur. fec. dic. 6, 7, l. 47, t. 6, L. 5; Poth. Ob. 121, 122; N. D. Délit, § 6, n. 5; 4 Zach. 24, *n.* 8; 11 Toul. 260-278, 282 --; C. N. 1384. [I. 61.]

1055. The owner of an animal is responsible for the damage caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it.—He who is using the animal is equally responsible while it is in his service.—The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.—ff. L. 1, § 4, 7; L. 5 Si. quad. paup. L. 1, 2, 7, de dam. inf.; Dom. l. 2, t. 8, s. 2, i. p. & n. 4, 5, 8-12; Id. e. t. s. 3, n. 1 --; C. N. 1385, 1386. [I. 61.]

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained idemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.—In the case of a duel, action may be brought in like manner not only against the immediate author of the death, but also against all those who took part

in the duel, whether as seconds or as witnesses.—In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive. These actions are independent and do not prejudice the criminal proceedings to which the parties may be subject.

CHAPTER FOURTH.

OF OBLIGATIONS WHICH RESULT FROM THE OPERATION OF LAW SOLELY.

1057. Obligations result in certain cases from the sole and direct operation of law, without the intervention of any act, and independently of the will of the person obliged or of him in whose favor the obligation is imposed.—Such are the obligations of tutors and other administrators who cannot refuse the charge cast upon them;—The obligation of children to furnish the necessaries of life to their indigent parents;—Certain obligations of owners of adjoining properties;—The obligations which in certain cases arise from fortuitous events;—And others of a like nature.—Dom. l. 2, t. 9; Poth. Ob. 123; 5 Marc. 238 on a. 1370; 11 Toul. 308-310; C. N. 1370. [I. 63.]

CHAPTER FIFTH.

OF THE OBJECT OF OBLIGATIONS.

1058. Every obligation must have for its object something which a party is obliged to give, or to do, or not to do.—ff. L. 3, i. p. De ob. & act.; Poth. Ob. 53, 129; C. N. 1126. [I. 63.]

1059. Those things only which are objects of commerce can become the object of an obligation.—ff. L. 83, § 5, De verb. ob.; Poth. Ob. 135; C. N. 1128. [I. 63.]

1060. An obligation must have for its object something determinate at least as to its kind.—The quantity of the thing may be uncertain, provided it be capable of being ascertained.—ff. l. c. L. 94, 95; Poth. n. 131; C. N. 1129. [I. 63.]

1061. Future things may be the object of an obligation.—But a person cannot renounce a succession not yet devolved, nor make any stipulation with regard to it, even with the consent of him whose succession is in question; except by marriage contract.—Cod. L. 15, De pact.; ff. l. c. L. 61; Poth. 132; C. N. 1130. [I. 63.]

1062. The object of an obligation must be something possible and not forbidden by law or good morals.—ff. L. 1, 85, De reg. jur.; Poth. 136, 137. [I. 63.]

CHAPTER SIXTH.

OF THE EFFECT OF OBLIGATIONS.

SECTION I.

General provisions.

1063. An obligation to give involves the obligation to deliver the thing and to keep it

safe until delivery.—ff. L. 11, § 1, 2, De act. em. et ven.; Poth. Ob. 142; C. N. 1136. [I. 65.]

1064. [The obligation to keep the thing safely obliges the person charged therewith to keep it with all the care of a prudent administrator.] ff. L. 5, § 2, Commod.; L. 17, De per. et com. r. vend.; Poth. Ob. 142; Dom. l. 1, t. 1, s. 3, n. 8; C. N. 1137. [I. 65.]

1065. Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages.—ff. L. 75, § 7, De verb. ob.; L. 13, i. f. De re jud.; Poth. 148, 157, 158; Dom. l. 1, t. 2, s. 2, n. 19, 20; C. N. 1142, 1144. [I. 65; III. 381.]

1066. The creditor, without prejudice to his claim for damages, may require also, that any thing which has been done in breach of the obligation shall be undone, if the nature of the case will permit; and the court may order this to be effected by its officers, or authorize the injured party to do it, at the expense of the other.—Author. under a. 1065; C. N. 1143. [I. 65.]

SECTION II.

Of defaults.

1067. The debtor may be put in default either by the terms of the contract, when it contains a stipulation that the mere lapse of the time for performing it shall have that effect; or by the sole operation of law; or by the commencement of a suit, or a demand which must be in writing unless the contract itself is verbal.—ff. L. 23, De verb. ob.; Cod. L. 12, De cont. et com. stip.; Poth. Ob. 144, 145, 147; 5 Guy. Demeure, 396; 6 Toul. 248-253; 10 Dur. n. 441 --; Lac. Retardement, 124; C. N. 1139. [I. 65.]

1068. The debtor is also in default, when the thing which he has obliged himself to give or to do could only have been given or done within a certain time which he has allowed to expire.—Poth. 143, 147, author. *sup.*; C. N. 1146. [I. 67.]

1069. [In all contracts of a commercial nature in which the time of performance is fixed, the debtor is put in default by the mere lapse of such time.]—Cod. L. 12, De cont. et com. stip.; 6 Toul. n. 246. [I. 67.]

SECTION III.

Of the damages resulting from the inexecution of obligations.

1070. Damages are not due for the inexecution of an obligation until the debtor is in default under some one of the provisions contained in the

articles of the preceding section; except the obligation be not to do, when he who contravenes it is liable for damages by the fact of the contravention alone.—C. N. 1146, 1145. [I. 67.]

1071. The debtor is liable to pay damages in all cases in which he fails to establish that the inexecution of the obligation proceeds from a cause which cannot be imputed to him, although there be no bad faith on his part.—ff. L. 5, De reb. cred.; Cod. De act. em. et vend. L. 4; Poth. 159, 164, 169; Dom. l. 3, t. 5, s. 2, n. 10; Id. l. 1, t. 2, s. 2, n. 16, 17; 6 Toul. 280, 281; C. N. 1147. [I. 67.]

1072. The debtor is not liable to pay damages when the inexecution of the obligation is caused by a fortuitous event or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract.—ff. L. 23, De reg. jur. i. f.; Poth. Ob. 142, 143, 149, 660-668; Dom. l. 1, t. 1, s. 3, n. 9; 6 Toul. n. 227, 228, 282; C. N. 1148. [I. 67.]

1073. The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived; subject to the exceptions and modifications contained in the following articles of this section.—ff. L. 13, Rat. r. hab.; Poth. Ob. 159, 160, Vente, 74,; Dom. l. 1, t, 1, s. 2, n. 17, 18; 6 Toul. 263; C. N. 1149. [I. 67.]

1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud.—Cod. L. 1, De sent. q. p. eo.; Poth. Ob. 161-5, Vente, 72, 73; Dom. l. c.; 6 Toul. 284--; C. N. 1150. [I. 67.]

1075. In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution. —ff. L. 13, De act. em.; Cod. l. 7, Leg. inex.; Poth. Ob. 166, 177; C. N. 1151. [I. 69.]

1076. [When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages. —But if the obligation have been performed in part, to the benefit of the creditor and the time for its complete performance be not material, the stipulated sum may be reduced; unless there be a special agreement to the contrary.]—Poth. 345; C. L. 1928; 6 Toul. n. 809-813; C. N. 1152, 1231. [I. 69; III. 381.]

1077. The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law.—These damages are due without the creditor being obliged to prove any loss. They are due from

the day of the default only, except in the cases where by law they are due from the nature of the obligation.—This article does not affect the special rules applicable to bills of exchange and contracts of suretyship.—Poth. 170, 171; Dom. l. 3, t. 5, s. 1, n. 2, 14; C. N. 1153. [I. 69.]

1078. Interest accrued from capital sums also bears interest:

1. When there is a special agreement to that effect;

2. When in any action brought such new interest is specially demanded;

3. When a tutor has received or ought to have received interest upon the moneys of his pupil and has failed to invest it within the term prescribed by law.—ff. L. 29, De u. et fruc.; 6 Toul. 271; 10 Dur. 498-9; C. N. 1154. [I. 69.]

CHAPTER SEVENTH.

OF DIFFERENT KINDS OF OBLIGATIONS.

SECTION I.

Of conditional obligations.

1079. An obligation is conditional when it is made to depend upon an event future and uncertain, either by suspending it until the event happens, or by dissolving it accordingly as the event does or does not happen.—When an obligation depends upon an event which has actually happened, but is unknown to the parties, it is not conditional. It takes effect or is defeated from the time at which it is contracted.—ff. L. 100, De verb. ob. 37-39, Si. cer. pet.; Poth. 199, 202; C. N. 1168. [I. 71.]

1080. Every condition contrary to law or inconsistent with good morals is void, and renders void the obligation which depends upon it.—An obligation which is made to depend upon the doing or happening of a thing impossible is also void.—ff. L. 7, L. 137, § 6, De verb. sig.; L. 1, § 9, 11, L. 31, De ob. et. act.; Poth. 204; C. N. 1172. [I. 71.]

1081. An obligation conditional on the will purely of the party promising, is void; but if the condition consist in the doing or not doing of a certain act, although such act be dependent on his will, the obligation is valid.—ff. L. 8, De ob. et act.; L. 108, § 1, De verb. ob.; Poth. 47, 48, 205; C. N. 1174. [I. 71.]

1082. If there be no time fixed for the fulfilment of a condition, it may always be fulfilled; and it is not deemed to have failed until it has become certain that it will not be fulfilled.—Poth. 209-211; 6 Toul. 623 --; C. N. 1176. [I. 71.]

1083. When an obligation is contracted under the condition that an event will not happen within a fixed time, such condition is fulfilled by the expiration of the time without the event having occurred. It is equally so if before the time has expired it become certain that the event will not happen. If there be no time fixed, the condition is not deemed fulfilled until it is

certain that the event will not happen.—Author. under a. 1082; C. N. 1177. [I. 71.]

1084. A conditional obligation becomes absolute when the party bound under the condition prevents the fulfilment of it.—ff. L. 81, § 1, De cond. & dem.; L. 85, § 7, De verb. ob.; L. 24 & 39, De reg. jur.; Poth. 212; Dom. l. 1, t. 1, s. 4, n. 17; C. N. 1178. [I. 71.]

1085. The fulfilment of the condition has a retroactive effect from the day on which the obligation has been contracted. If the creditor be dead before the fulfilment of the condition, his rights pass to his heirs or legal representatives.—ff. L. 18, 144, De reg. jur.; Arg. ex L. 26, De cond. inst.; Poth. 220; Dom. l. 1, t. 1, s. 4, n. 7, 13; C. N. 1179. [I. 71.]

1086. The creditor may, before the fulfilment of the condition, do all acts conservatory of his rights.—Poth. 222; C. N. 1180. [I. 71.]

1087. When the obligation has been contracted under a suspensive condition, the debtor is bound to deliver the thing which is the object of it, upon the fulfilment of the condition. —If, without the fault of the debtor, the thing have altogether perished or can no longer be delivered, no obligation exists.—If the thing be deteriorated without the fault of the debtor, the creditor must receive it, in the state in which it is, without diminution of price.—If the thing be deteriorated by the fault of the debtor, the creditor may either exact the thing in the state in which it is, or demand the dissolution of the contract, with damages in either case.—ff. L. 8, 10, De per. et com. r. ven.; Cod. l. 4, t. 4, L. 5; Poth. 218, 219; Dom. l. 1, t. 1, s. 4, n. 10; C. N. 1282. [I. 71.]

1088. A resolutive condition, when accomplished, effects of right the dissolution of the contract. It obliges each party to restore what he has received, and replaces things in the same state as if the contract had not existed; subject nevertheless to the rules established in the last preceding article with respect to things which have perished or been deteriorated.—Cod. l. 8, t. 38, L. 12; Arg. ex L. 1 & 4, ff. De le. Com.; Poth. 224, 636; 6 Toul. 550, 551; C. N. 1183. [I. 73.]

SECTION II.

Of obligations with a term.

1089. A term differs from a suspensive condition inasmuch as it does not suspend the obligation, but only delays the execution of it.—ff. L. 41, § 1, L. 46, De verb. ob.; Poth. 230; C. N. 1185. [I. 73.]

1090. That which is due with a term of payment cannot be exacted before the expiration of the term; but that which has been paid in advance voluntarily and without error or fraud cannot be recovered. — ff. L. 1, § 1, De cond. & dem.; L. 46, l. c. *sup.*; Poth. 230, 231, 547; Dom. l. 1, t. 1, s. 3, n. 7, l. 4. t. 1, s. 1, n.

5; 4 Marc. 572-4; 5 Id. 256; 11 Dur. 113; 3 Zach. 385, n. 6; 11 Toul. 59, 60; C. N. 1186. [I. 73.]

1091. The term is always presumed to be stipulated in favor of the debtor, unless it results from the stipulation or the circumstances that it has also been agreed upon in favor of the creditor.—ff. L. 41, § 1, de verb. ob.; Poth. 833; C. N. 1187. [I. 73.]

1092. The debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract.—Poth. 234, 235; C. N. 1188. [I. 73.]

SECTION III.

Of alternative obligations.

1093. The debtor in an alternative obligation is discharged by giving or doing one of the two things which form the object of his obligation; but he cannot compel the creditor to accept a part of one of these things and a part of the other.—ff. L. 78, § ult., De cond. & dem.; L. 8, § 1, De leg. 1°; Poth. 245-247; C. N. 1189, 1191. [I. 73.]

1094. The option belongs to the debtor unless it has been expressly granted to the creditor.—ff. L. 2, § 3, De eo q. certo loco; L. 25, De cont. em; Poth. 247, 248, 283; Dom. l. 1, t. 1, s. 2, n. 15; C. N. 1190. [I. 75.]

1095. An obligation is pure and simple although contracted in an alternative form, if one of the two things promised could not be the object of the obligation.—ff. L. 72, § 4, De solut.; Poth. 249; C. N. 1192. [I. 75.]

1096. An alternative obligation becomes pure and simple if one of the things promised perish, or can no longer be delivered, even through the fault of the debtor. The value of such thing cannot be offered in its place;—If both things have perished or can no longer be delivered, and the debtor be in fault with respect to one of them, he must pay the value of that which remained last.—ff. L. 34, § 6, De cont. em., L. 115, De verb. ob.; L. 2, § 3, De eo q. certo loco; L. 95, De solut.; Poth. Ob. 250-252, Vente, 312; ff. L. 47, § 3, De leg. 1°; Lac. Alternative, n. 2; C. N. 1193. [I. 75.]

1097. When, in the cases provided for in the last preceding article, the option has been granted by the contract to the creditor:—Either one of the two things has perished or can no longer be delivered, and then, if it be without the fault of the debtor, the creditor shall have the one which remains, but if the debtor be in fault, the creditor may demand the thing which remains or the value of the other;—Or both things have perished or can no longer be delivered, and if the debtor be in fault with regard to both or either of them, the creditor may demand the value of the one or of the other at his option.—ff. L. 95, De solut.; Poth. 253; C. N. 1194. [I. 75.]

1098. If both things have perished, the obligation is extinguished in the cases and subject to the conditions provided in article 1200.—C. N. 1195. [I. 75.]

1099. The rules contained in the articles of this section apply to cases where the alternative obligation comprises more than two things, or has for its object to do or not to do some thing.—C. N. 1196. [I. 75.]

SECTION IV.

Of joint and several obligations.

§ 1. *Of joint and several interest among creditors.*

1100. A joint and several interest among creditors gives to each of them singly the right of exacting the performance of the whole obligation and thereupon of discharging the debtor. —Cod., De duo. reis stip. et prom.; ff. L. 2, De duo. reis const.; Poth. 258-260; Dom. l. 3, t. 3, s. 2, n. 1, 2, 6, & Intr. to t. 3, p. 247, fol. ed.; C. N. 1197. [I. 77.]

1101. The debtor has the option of paying to either of the joint and several creditors, so long as he is not prevented by a suit instituted by one of them.—[Nevertheless, if one of the creditors release the debt, the debtor is discharged for the part only of such creditor. The same rule applies to all cases in which the debt is extinguished otherwise than by actual payment; subject to the rules applicable to commercial partnerships.]—ff. L. 2, 16, De duo. reis; Poth. 260; Dom. l. c. & n. 3; C. N. 1198. [I. 77.]

1102. The rules concerning the interruption of prescription in relation to joint and several creditors are declared in the title *Of Prescription*.—Cod. L. 5, De duo. reis stip.; Poth. 260; Dom. l. c. n. 5; C. N. 1199. [I. 77.]

§ 2. *Of debtors jointly and severally obliged.*

1103. There is a joint and several obligation on the part of the codebtors when they are all obliged to the same thing, in such manner that each of them singly may be compelled to the performance of the whole obligation, and that the performance by one discharges the others toward the creditor. —ff. L. 2, L. 3, § 1, L. 11, § 1, De duo. reis const.; Cod. L. 3, De duo. reis stip.; Poth. 261, 263, 274; Dom. l. 3, t. 3, s. 1, n. 1; C. L. 2086; C. N. 1200. [I. 77.]

1104. An obligation may be joint and several although one of the codebtors be obliged differently from the others to the performance of the same thing; for example, if one be obliged conditionally while the obligation of the other is pure and simple, or if one be allowed a term which is not granted to the other.—ff. L. 7, L. 9, § 2, De duo. reis const.; Poth. 263; Dom. l. 3, t. 3, s. 1, n. 5; C. L. 2087; C. N. 1201. [I. 77.]

1105. An obligation is not presumed to be joint and several; it must be expressly

declared to be so.—This rule does not prevail in cases where a joint and several obligation arises of right by virtue of some provision of law;—Nor is it applicable to commercial transactions, in which the obligation is presumed to be joint and several, except in cases otherwise regulated by special laws.—Nov. 99, c. 1; ff. L. 6, L. 8, L. 11, § 2, De duo. reis const.; L. 43, De re jud. et eff. sent.; Cod. L. 3, De duo. reis; Poth. 265, 266; Bout. Inst. 444; 2 Bor. 491, 492, t. 4, a. 7, O. 1673; Dom. l. 3, t. 3, s. 1, n. 2; C. N. 1202. [I. 79.]

1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.—Poth. Ob. 264. [I. 79.]

1107. The creditor of a joint and several obligation may apply for payment to any one of the codebtors at his option, without such debtor having a right to plead the benefit of division.—ff. L. 3, § 1, De duo. reis; L. 47, Loc. cond., Nov. 99, c. 1; Poth. 270; 4 Bret. H. 419; Dom. l. 3, t. 3, s. 1, n. 3; C. L. 2089; C. N. 1203. [I. 79.]

1108. Legal proceedings taken against one of the codebtors do not prevent the creditor from taking similar proceedings against the others.—Cod. L. 28, De fid. et mand. 8, 41; Poth. 271; Dom. l. c. sup. n. 7; C. L. 2090; C. N. 1204. [I. 79.]

1109. If the thing due have perished or can no longer be delivered, through the fault of one or more of the joint and several debtors, or after he or they have been put in default, the other codebtors are not discharged from the obligation to pay the price of the thing, but the latter are not liable for damages.—The creditor can recover damages only from the codebtors through whose fault the thing has perished or can no longer be delivered, and those in default.—ff. L. 18, De duo. reis const.; L. 32, § 4, De u. et fruc.; L. 173, § 2, De div. reg. jur.; Dum. de div. et indiv., pt. 3, n. 126, 7; Poth. 273; C. L. 2091; C. N. 1205. [I. 79.]

1110. The rules concerning the interruption of prescription in relation to joint and several debtors are declared in the title *Of Prescription*.—Cod. L. 5, De duo. reis; Poth. 272; Dum. l. c. sup. n. 9; C. L. 2092; C. N. 1206. [I. 79.]

1111. A demand of interest made against one of the joint and several debtors causes interest to run against them all.—Cod. Arg. ex. L. 5, De duob. reis; Poth. 272; 6 Toul. n. 729; 4 Marc. n. 611; C. L. 2093; C. N. 1207. [I. 81.]

1112. A joint and several debtor sued by the creditor may plead all the exceptions which are personal to himself as well as such as are common to all the codebtors.—He cannot plead such exceptions as are purely personal to one or more of the other codebtors.—ff. L. 10, 19, De duob. reis.; Poth. 274; Dom. l. c. n. 8; C. L. 2094; C. N. 1208. [I. 81.]

1113. When one of the co-

debtors becomes heir or legal representative of the creditor, or when the creditor becomes heir or legal representative of one of the codebtors, the confusion extinguishes the joint and several debt only for the part and portion of such codebtor.—ff. L. 50, L. 95, § 2, De solut. & lib.; Poth. 276; Dom. l. c.; C. L. 2095; C. N. 1209. [I. 81.]

1114. The creditor who consents to the division of the debt with regard to one of the codebtors, preserves his joint and several right against the others for the whole debt.—Poth. Ob. 277; Rente, 194, 195; C. L. 2096; C. N. 1210. [I. 81.]

1115. A creditor who receives separately the share of one of his codebtors, so specified in the receipt and without reserve of his rights, renounces the joint and several obligation with regard only to such codebtor.—The creditor is not deemed to discharge the debtor from his joint and several obligation when he receives from him a sum equal to the share for which he is bound, unless the receipt specifies that it is for his share.—The rule is the same with regard to a demand made against one of the codebtors for his share, if the latter have not acquiesced in the demand, or if a judgment of condemnation have not intervened.—Cod. L. 18, De pac.; Poth. 277, 278, 611; Bac. D. J. c. 21, n. 245; C. L. 2097; C. N. 1211. [I. 81.]

1116. The creditor who receives separately and without reserve the share of one of the codebtors in the arrears or interest of the debt, loses his joint and several right only for the arrears and interests accrued and not for those which may in future accrue, nor for the capital, unless the separate payment has been continued during [ten] consecutive years.—Bac. D. J. n. 246; Poth. 279; C. L. 2098; C. N. 1212. [I. 81.]

1117. The obligation contracted jointly and severally toward the creditor is divided of right among the codebtors, who among themselves are obliged each for his own share and portion only.—Cod. L. 2, De duo. reis stip. et prom.; Poth. 264; Dom. l. 3, t. 3, s. 1, n. 6; C. L. 2099; C. N. 1213. [I. 83.]

1118. The codebtor of a joint and several debt who has paid it in full, can only recover from the others the share and portion of each of them, even though he be specially subrogated in the rights of the creditor.—If one of the codebtors be found insolvent, the loss occasioned by his insolvency is divided by contribution among all the others, including him who has made the payment.—ff. 4, L. 36, 39, De fid. & mand.; L. 46, De solut.; Poth. 264, 281, 282; Dom. l. c.; C. N. 1214. [I. 83.]

1119. In case the creditor have renounced his joint and several action against one of the debtors, if one or more of the remaining codebtors become insolvent, the shares of those who are insolvent are made up by contribution by all the other

codebtors, except the one so discharged whose part in the contribution is borne by the creditor.—Poth. 278, 281; 6 Toul. n. 739; 4 Marc. on. a. 1215; Delv. p. 144, n. 6; 11 Dur. n. 231; 3 Zach. 361, n. 21; C. N. 1215. [I. 83.]

1120. If the matter for which the debt has been contracted jointly and severally concern only one of the codebtors, he is liable for the whole toward his codebtors, who, with regard to him, are considered only as his sureties.—Poth. 264, 282, 295; C. N. 1216. [I. 83.]

SECTION V.

Of divisible and indivisible obligations.

1121. An obligation is divisible when it has for its object a thing which in its delivery or performance is susceptible of division either materially or intellectually.—ff. L. 2, § 1, De verb. ob; L. 9, § 1, De solut.; Dum. de div. & indiv. pt. 1, n. 5, pt. 2, n. 200, 201; Poth. Ob. 288, 289, Suc. c. 5, a. 3, § 5; C. N. 1217. [I. 83.]

1122. A divisible obligation must be performed between the creditor and the debtor, as if it were indivisible. The divisibility takes effect only with their heirs or legal representatives, who, on the one hand, cannot enforce the obligation, and, on the other, are not held for the performance of it, beyond their respective shares as representing the creditor or the debtor.—Cod. L. 2, De hered. act.; ff. L. 33, De leg. 2°; Poth. Ob. 209, 498, 311, 316, 317; Rente, c. 7, a. 3; C. N. 1220. [I. 83.]

1123. The rule established in the last preceding article is subject to exception with respect to the heirs and legal representatives of the debtor, and the obligation must be performed as if it were indivisible, in the three following cases:

1. When the object of the obligation is a certain specific thing of which one of them is in possession;

2. When one of them alone is charged by the title with the performance of the obligation;

3. When it results either from the nature of the contract or of the thing which is the object of it, or from the end proposed by it, that the intention of the contracting parties was that the obligation should not be performed in parts.—[In the first case, he who possesses the thing due,—in the second case, he who is alone charged, — and in the third case, each of the coheirs or legal representatives, may be sued for the whole thing due; saving in all cases the recourse of the one sued against the others.]—ff. L. 85, De verb. ob., L. 80, § 1, Ad. L. Fal.; Dum. de div. et indiv. pt. 2, n. 20, 30, 33; Poth. 302, 303, 307, 315; 4 Marc. n. 640-642; Rod. Ob. div. & indiv. n. 329--; C. N. 1221. [I. 85.]

1124. An obligation is indivisible:

1. When it has for its ob-

ject something which by its nature is not susceptible of division, either materially or intellectually;

2. When although the object of the obligation is divisible by its nature, yet from the character given to it by the contract, this object becomes insusceptible not only of performance in parts but also of division. — Author. under a. 1122; Poth. 241, 242, 293-295; 4 Marc. 627-635; Rod. l. c.; C. N. 1217, 1218. [I. 85.]

1125. The stipulation of joint and several liability does not give to an obligation the character of indivisibility.—Dum. de div. et indiv. pt. 2, n. 222; Poth. 287, 323, 324; C. N. 1219; C. L. 2106. [I. 85.]

1126. Each one of those who have contracted an indivisible obligation is held for the whole although the obligation have not been contracted jointly and severally.—ff. L. 2, § 1, 2, 4, De verb. ob.; Poth. 322, 323; C. N. 1222; C. L. 2109. [I. 85.]

1127. The rule established in the last preceding article prevails also with regard to the heirs and legal representatives of him who has contracted an indivisible obligation.—ff. L. 192, De reg. jur.; L. 80, § 1, Ad L. Fal.; L. 2, § 2, De verb. ob.; Poth. Ob. 322, Suc. c. 5, a. 3, § 5; C. N. 1223; C. L. 2110. [I. 87.]

1128. The obligation to pay damages resulting from the non-performance of an indivisible obligation is divisible. —But if the non-performance have been caused by the fault of one of the codebtors, or of one of the coheirs or legal representatives, the whole amount of damages may be demanded of such codebtor, heir or legal representative.—ff. L. 85, § 5, L. 139, De verb. ob.; Poth. Ob. 304, 305, 324, 334; Suc. c. 5, a. 3, § 5. [I. 87.]

1129. Each coheir or legal representative of the creditor may exact in full the execution of an indivisible obligation.—He cannot alone release the whole of the debt, or receive the value instead of the thing itself; if one of the coheirs or legal representatives have alone released the debt or received the value of the thing, the others cannot demand the indivisible thing without making allowance for the portion of him who has made the release or who has received the value.—ff. L. 25, § 9, Fam. ercisc.; L. 2, § 2, De verb. ob.; L. 13, § 12, De acceptil.; Poth. 326-329; 4 Marc. 497-8; C. N. 1224; C. L. 2111. [I. 87.]

1130. The heir or legal representative of the debtor sued for the whole of an indivisible obligation may demand delay to make the coheirs or other legal representatives parties to the suit, unless the debt is of such a nature that it can be discharged only by the one so sued, who may in such case be condemned alone, saving his recourse for indemnity against the others.—ff. L. 11, § 23, De leg. 3°; Dum. De div. & indiv. pt. 3, n. 90, 100, 104, 107, pt. 2, n. 175, 469; Poth. 330, 331, 333-335; C. N. 1225. [I. 87.]

SECTION VI.

Of obligations with a penal clause.

1131. A penal clause is a secondary obligation by which a person, to assure the performance of the primary obligation, binds himself to a penalty in case of its inexecution.—ff. L. 71 & 137, § 7, De verb. ob.; L. 44, § 5, De ob. & act., L. 13, § 2, De reb. dub., L. 41 & 42, Pro soc., L. 28, De act. em. & ven.; Poth. 184, 337, 342; Dom. l. 1, t. 1, s. 4, n. 18; C. N. 1226. [I. 87.]

1132. The nullity of the primary obligation for any other cause than want of interest, carries with it that of the penal clause. The nullity of the latter does not carry with it that of the primary obligation.—ff. L. 97, i. p. L. 126, § 3, De verb. ob.; Poth. 339, 340; 6 Toul. 815; C. N. 1227. [I. 87.]

1133. The creditor may enforce the performance of the primary obligation, if he elect so to do, instead of demanding the stipulated penalty;—But he cannot demand both, unless the penalty has been stipulated for a simple delay in the performance of the primary obligation.—ff. L. 10, § 1, De pac.; L. 132, § 2, De verb. ob.; L. 28, De act. em. & ven.; Poth. 343, 344; C. N. 1228, 1229. [I. 89.]

1134. The penalty is not incurred until the debtor is in default of performing the primary obligation, or has done the thing which he had obliged himself not to do.—C. N. 1230. [I. 89.]

1135. [The amount of penalty cannot be reduced by the court.—But if the obligation have been performed in part to the benefit of the creditor, and the time fixed for its complete performance be not material, the penalty may be reduced; unless there is a special agreement to the contrary.] Poth. 345; Dom. l. 1, t. 1, s. 4, n. 18; 6 Toul. 809-813; 4 Marc. 654, 526, 527; C. N. 1152, 1231; C. L. 2123. [I. 89.]

1136. When the primary obligation contracted with a penal clause is indivisible, the penalty is incurred upon the contravention of it by any one of the heirs or other legal representatives of the debtor; and it may be demanded in full against him who has contravened it, or against each one of them for his share and portion, and hypothecarily for the whole; saving their recourse against him who has caused the penalty to be so incurred. —ff. L. 5, § 1, L. 84, § 3, De verb. ob.; Dum. pt. 3, n. 173, 174; Poth. 355, 366; C. N. 1232; Sedg. 421 --. [I. 89.]

1137. When the primary obligation contracted under a penalty is divisible, the penalty is incurred only by that one of the heirs or other legal representatives of the debtor who contravenes the obligation, and for the part only for which he is held in the primary obligation, without there being any action against those who have executed it.—This rule suffers exception when, the

penal clause having been added with the intention that the payment could not be made in parts, one of the coheirs or other legal representatives has prevented the execution of the obligation for the whole; in this case he is liable for the entire penalty and the others are liable for their respective shares only, saving their recourse against him.—ff. L. 2, § 5, 6; L. 72, De verb. Ob.; Poth. 306, 359, 360, 361; Dum. pt. 3, n. 412; 6 Toul. n. 842-845; C. N. 1218, 1233. [I. 89.]

CHAPTER EIGHTH.

OF THE EXTINCTION OF OBLIGATIONS.

SECTION I.

General provisions.

1138. An obligation becomes extinct:—By payment;—By novation;—By release;—By compensation;—By confusion;—By the performance of it becoming impossible;—By judgment of nullity or rescission;—By the effect of the resolutive condition, which has been explained in the preceding chapter;—By prescription;—By the expiration of the time limited by law or by the parties for its duration;—By the death of the creditor or debtor in certain cases;—By special causes applicable to particular contracts which are explained under their respective heads.—C. N. 1234. [I. 91.]

SECTION II.

Of payment

§ 1. *General provisions.*

1139. By payment is meant not only the delivery of a sum of money in satisfaction of an obligation, but the performance of any thing to which the parties are respectively obliged.—Dom. l. 4, t. 1, s. 1, n. 1, 3; Poth. 494; C. L. 2127. [I. 91.]

1140. Every payment presupposes a debt; what has been paid where there is no debt may be recovered.—There can be no recovery of what has been paid in voluntary discharge of a natural obligation.—ff. L. 1, 10, 13, 14, 16, 17, 18, De cond. indeb.; L. 176, De verb. sig.; Poth. 192, 195, 218; Dom. l. 2, t. 7, s. 1, n. 1, 4, 5; l. 4, t. 1, s. 1, n. 4, 5; C. L. 2129; C. N. 1235. [I. 91.]

1141. Payment may be made by any person, although he be a stranger to the obligation, and the creditor may be put in default by the offer of a stranger to perform the obligation on the part of the debtor without the knowledge of the latter, but it must be for the advantage of the debtor and not merely to change the creditor that the performance of the obligation is so offered.—ff. L. 23, 31, 40, 53, De solut.; Dom. l. 4, t. 1, s. 1, n. 7, s. 3, n. 2, s. 2, n. 10; Poth. 499, 500, 598; C. N. 1236, 1237. [I. 91.]

1142. If the obligation be to do something which the creditor has an interest in having done by the debtor himself, the obligation cannot be performed by a stranger to

it without the consent of the creditor.—ff. L. 72, § 2, De solut.; Poth. 500; 6 Toul. n. 11; O. 1673, t. 5, a. 3; C. L. 2131. [I. 91.]

1143. Payment to be valid must be made by one having a legal right in the thing paid which entitles him to give it in payment. — Nevertheless if a sum of money or other thing of a nature to be consumed by use be given in payment, it cannot be reclaimed from the creditor who has consumed it in good faith, although the payment have been made by one who was not the owner nor capable of alienating it.—ff. L. 54, De reg. jur., L. 14, § fin. L. 94, De solut.; Poth. 495-498, 540; 6 Toul. n. 6, p. 14; 4 Marc. on a. 1238; C. N. 1238. [I. 93.]

1144. Payment must be made to the creditor or to some one having his authority, or authorized by a court of justice or by law to receive it for him. —Payment made to a person who has no authority to receive it is valid, if the creditor have ratified the payment or profited by it.—ff. L. 180, De reg. jur.; L. 12, i. p. § 4, L. 49, L. 15, De solut. et lib.; Poth. 242, 501, 506, 508 --; C. L. 2136; C. N. 1239. [I. 93.]

1145. Payment made in good faith to the ostensible creditor is valid, although it be afterwards established that he is not the rightful creditor.—Poth. 503; C. L. 2141; C. N. 1240. [I. 93.]

1146. Payment is not valid if made to a creditor who is incapable by law of receiving it, unless the debtor proves that the thing paid has turned to the benefit of such creditor.—ff. L. 15, L. 47, De solut. et lib.; Poth. 504-509; C. L. 2143; C. N. 1241. [I. 93.]

1147. Payment made by a debtor to his creditor to the prejudice of a seizure or attachment is not valid against the seizing or attaching creditors, who may, according to their rights, constrain the debtor to pay a second time; saving, in such case, only his remedy against the creditor so paid.—Poth. Ob. 505, C. R. 87; C. L. 2145; C. N. 1242. [I. 93.]

1148. A creditor cannot be compelled to receive any other thing than the one due to him, although the thing offered be of greater value than the thing due.—ff. L. 2, § 1, De reb. cred.; Dom. l. 4, t. 1, s. 2, n. 9; Poth. 243, 530; C. N. 1243. [I. 93.]

1149. A debtor cannot compel his creditor to receive payment of his debt in parts, even if the debt be divisible.—[Nor can the court in any case by its judgment order a debt actually payable to be paid by instalments without the consent of the creditor.]—ff. 1, L. 21, De reb. cred.; L. 41, § 1, De us.; C. S. L. C. c. 83, s. 199, c. 94, s. 37; C. N. 1244. [I. 93.]

1150. The debtor of a certain specific thing is discharged by the delivery of the thing in the condition in which it is at the time of delivery, provided that the deterioration in the thing has not been caused by any act or fault for which he is responsible, and that pre-

viously to the deterioration he was not in default.—ff. L. 23, 33, 37, 51, De verb. ob.; L. 33, De solut.; Poth. 544; C. L. 2151; C. N. 1245. [I. 95.]

1151. If the object of the obligation be a thing determined in kind only, the debtor cannot be required to give a thing of the best quality, nor can he offer in discharge one of the worst.—The thing must be of a merchantable quality.—ff. L. 33, De solut. & lib.; Poth. 283-4; C. L. 2152; C. N. 1246. [I. 95.]

1152. Payment must be made in the place expressly or impliedly indicated by the obligation.—If no place be so indicated, the payment, when it is of a certain specific thing, must be made at the place where the thing was at the time of contracting the obligation.—In all other cases payment must be made at the domicile of the debtor; subject, nevertheless, to the rules provided under the titles relating to particular contracts.—ff. L. 9, De co. q. certo loco; L. 21, De ob. & act.; Poth. 238-240, 548, 549; C. L. 2153; C. N. 1247. [I. 95.]

1153. The expenses attending payment are at the charge of the debtor.—Poth. 550; N. Fer. Paiement, n. 493; C. N. 1248. [I. 95.]

§ 2. *Of payment with subrogation.*

1154. Subrogation in the rights of a creditor in favor of a third person who pays him, is either conventional or legal.—Ren. Subrogation, c. 2, XXII; C. N. 1249. [I. 95.]

1155. Subrogation is conventional:

1. When the creditor, on receiving payment from a third person, subrogates him in all his rights against the debtor. This subrogation must be express and made at the same time as the payment.

2. When the debtor borrows a sum for the purpose of paying his debt, and of subrogating the lender in the rights of the creditor. It is necessary to the validity of the subrogation in this case, that the act of loan and the acquittance be notarial [or be executed before two subscribing witnesses;] that in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt, and that in the acquittance it be declared that the payment has been made with the moneys furnished by the new creditor for that purpose. This subrogation takes effect without the consent of the creditor.—[If the act of loan and the acquittance be executed before witnesses, the subrogation takes effect against third persons from the date only of their registration, which is to be made in the manner and according to the rules provided by law for the registration of hypothecs.]—ff. L. 24, § 3, De reb. auc. jud.; Poth. C. O. t. 20, n. 78, 80, 81; Ren. c. 10, n. 5-7, 12-14, 22, 23; Dom. l. 4, t. 1, s. 1, n. 9; Del. May, 1609; Arr. 1690; C. N. 1250. [I. 97.]

1156. Subrogation takes

place by the sole operation of law and without demand:

1. In favor of a creditor who pays another creditor whose claim is preferable to his by reason of privilege or hypothec;

2. [In favor of the purchaser of immoveable property who pays a creditor to whom the property is hypothecated;

3. In favor of a party who pays a debt for which he is held with others or for others, and has an interest in paying it;]

4. In favor of a beneficiary heir who pays a debt of the succession with his own moneys;

5. When a rent or debt due by one consort alone has been redeemed or paid with the moneys of the community; in this case the other consort is subrogated in the rights of the creditor according to the share of such consort in the community.—C. P. 244, 245; Ren. c. 4, i. f.; c. 7, n. 68 & c. 9, n. 7; Poth. C. O. t. 20, n. 71-73, C. R. 176, Hyp. c. 2, s. 1, a. 2, § 6, Ob. 280, 281, 520-522; 5 J. A. Arr. 26 Aug. 1706; 1 Dupl. C. P. a. 244, 245, c. 2, s. 3, p. 450; Lem. 239-241, on a. 244, 245, C. P.; Leb. Com. l. 3, c. 2, s. 1, n. 13--, p. 409; 2 Leb. 46, n. 19, ed. 1775; 7 Toul. 142--; 4 Marc. 710, 711; 12 Dur. n. 146--; C. N. 1251. [I. 99.]

1157. The subrogation declared in the preceding articles takes effect as well against sureties as against principal debtors. It cannot prejudice the rights of the creditor when he has been paid in part only; in such case he may enforce his rights for whatever remains due, in preference to him from whom he has received payment in part.—Poth. C. O. t. 20, n. 83, 84, 87, Ob. 280, 556, Hyp. c. 2, s. 3; J. A. Arr. 6 June, 1712; Ren. c. 15, 16; C. N. 1252. [I. 99.]

§ 3. *Of the imputation of payments.*

1158. A debtor of several debts has the right of declaring, when he pays, what debt he means to discharge.—ff. L. 1, De solut. et lib.; Cod. L. 1, e. t.; Poth. 539, 564; Dom. l. 4, t. 1, s. 4, n. 1; C. L. 2159; C. N. 1253. [I. 99.]

1159. A debtor of a debt which bears interest or produces rent, cannot without the consent of the creditor impute any payment which he makes to the discharge of the capital, in preference to the arrears of interest or of rent. Any payment made on the capital and interest, but which is not entire, is imputed first upon the interest.—ff. L. 5, 99, De solut. et lib.; Poth. 569-570; Dom. l. 4, t. 1, s. 4, n. 7, 8; C. L. 2160; C. N. 1254. [I. 99.]

1160. When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided.—ff. Arg. ex L. 1, 2, 3, De solut. et lib.; Poth. 566; C. L. 2161; C. N. 1255. [I. 99.]

1161. When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying. If of several debts one alone be actually payable, the payment must be imputed in discharge of such debt although it be less burdensome than those which are not actually payable.—If the debts be of like nature and equally burdensome, the imputation is made upon the oldest. — All things being equal, it is made proportionally on each.—ff. L. 1, 2, 3, 4, 5, 7, 8 & 103, De solut. & lib.; Poth. 530-532; Dom. l. 4, t. 1, s. 4, n. 3, 4, 7; C. L. 2162; C. N. 1256. [I.99.]

§ 4. *Of tender and deposit.*

1162. When a creditor refuses to receive payment, the debtor may make an actual tender of the money or other thing due; and in any action afterwards brought for its recovery he may plead and renew the tender, and if the thing due be a sum of money, may deposit the amount; and such tender, or such tender and deposit, if the thing due be a sum of money, are equivalent with respect to the debtor to a payment made on the date of the first tender; provided that from the date of the first tender the debtor continue always ready and willing to deliver the thing or to pay the sum of money. — Poth. Ob. 572, 573, 580; Id. C. R. n. 203; Id. Dép. 199; Dom. l. 4, t. 1, s. 2, n. 8; Lac. Consignation, Offres; 1 Pi. 430-436; C. N. 1257. [I. 101.]

1163. It is necessary to the validity of a tender:

1. That it be made to a creditor legally capable of receiving payment or to some one having authority to receive for him;

2. That it be made on the part of a person legally capable of paying;

3. That it be of the whole sum of money or other thing payable, and of all arrears of rent and interest, and all liquidated costs, with a sum for costs not liquidated, saving the right to make up any deficiency in the same;

4. That, if it be of money, it be made in coin declared by law to be current and a legal tender;

5. That the term of payment have expired if stipulated in favor of the creditor;

6. That the condition under which the debt has been contracted have been fulfilled.

7. That the sum of money or other thing tendered be offered at the place where, according to the terms of the obligation or by law, payment should be made.—Poth. 574-580; C. N. 1258. [I. 101.]

1164. [If, by the terms of the obligation or by law, payment is to be made at the domicile of the debtor, a notification in writing by him to the creditor that he is ready to make payment has the same effect as an actual tender, provided that in any action afterwards brought the debtor make proof that he

had the money or thing due ready for the payment at the time and place when and where the same was payable.] [I. 101.]

1165. If a certain specific thing be deliverable on the spot where it is, the debtor must by his tender require the creditor to come and take it there.—If the thing be not so deliverable and be from its nature difficult of transportation, the debtor must indicate by his tender the place where it is and the day and hour when he is ready to deliver it at the place where payment ought to be made.—If the creditor fail in the former case to take the thing away, or in the latter to signify his willingness to accept, the debtor may, if he think fit, remove the thing to any other place for safekeeping at the risk of the creditor.—Lac. Offres; Poth. Ob. 577; 2 Kt. 506-509; 2 Sto. Con. n. 1005, a.; 2 Glf. Ev. n. 610; 4 Marc. n. 742, 743; C. N. 1264. [I. 101.]

1166. So long as the tender and deposit have not been accepted by the creditor, the debtor may withdraw them by leave of the court, in the manner provided in the Code of Civil Procedure, and if he do so his codebtors or sureties are not discharged.—Poth. 580; C. N. 1261. [I. 103.]

1167. When the tender and deposit have been declared valid by the court, the debtor cannot, even with the consent of the creditor, withdraw them to the prejudice of his codebtors or sureties or other third persons.—Poth. l. c.; C. N. 1262, 1263. [I. 103.]

1168. The mode in which tenders and deposits must be made is provided in the Code of Civil Procedure. [I. 103.]

SECTION III.

Of novation.

1169. Novation is effected:

1. When the debtor contracts towards his creditor a new debt which is substituted for the ancient one, and the latter is extinguished;

2. When a new debtor is substituted for a former one who is discharged by the creditor;

5. When by the effect of a new contract, a new creditor is substituted for a former one toward whom the debtor is discharged. — ff. L, 1, 2, 11, De nov. et del.; Cod. L. 1, 3, c. t.; Poth. 582-584, 597, 605; Dom. l. 4, t. 3, s. 1, n. 1, t. 4, s. 1, n. 1; 7 Toul. n. 274; 3 Zach, 448, *n.* 15; 2 Delv. 172, on a. 1271; C. N. 1271. [I. 103.]

1170. Novation can be effected only between persons capable of contracting.—ff. L. 3, De nov. et del. L. 20, § 1, c. t.; Poth. 590-592; Dom. l. 4, t. 3, s. 2, n. 1; C. N. 1272. [I.103.]

1171. Novation is not presumed. The intention to effect it must be evident.—ff. L. 2, De nov. et del.; Dom. l. 4, t. 3, s. 1, n. 1; Poth. 594; C. N. 1273. [I. 103.]

1172. Novation by the substitution of a new debtor may be effected without the con-

currence of the former one.—Cod. L. 1, De nov. et del.; ff. L. 8, § 5, De nov.; Poth. 598; Dom. l. 4, t. 3, s. 1, n. 2; C. N. 1274. [I. 103.]

1173. The delegation by which a debtor gives to his creditor a new debtor who obliges himself towards the creditor does not effect novation, unless it is evident that the creditor intends to discharge the debtor who makes the delegation.—ff. L. 11, De nov. et del.; Poth. 600, 603; Dom. l. c.; C. N. 1275. [I. 105.]

1174. The simple indication by the debtor of a person who is to pay in his place, or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor, does not effect novation.—ff. L. 20, 21, 25, De nov. et del.; Poth. Ob. 605, Vente, 551, 553; 7 Toul. 274; 3 Zach. 448, n. 15; C. N. 1277. [I. 105.]

1175. A creditor who has discharged his debtor by whom delegation has been made, has no remedy against such debtor, if the person delegated become insolvent, unless there is a special reserve of the remedy.—Cod. L. 3, De nov. et del.; ff. L. 30, c. t.; Poth. 604; Dom. l. 4, t. 4, s. 1, n. 8; C. N. 1276. [I. 105.]

1176. The privileges and hypothecs which attach to an ancient debt do not pass to the one which is substituted for it, unless the creditor has expressly reserved them.—ff. L. 18, De nov. et del., L. 12, § 5, q. pot. in pign.; Poth. 599; Dom. l. 4, t. 4, s. 1, n. 8, t. 3, s. 1, n. 5; C. N. 1278. [I. 105.]

1177. When novation is effected by the substitution of a new debtor, the original privileges and hypothecs cannot be transferred to the property of the new debtor; nor can they, without the concurrence of the former debtor, be reserved upon the property of the latter.—ff. L. 30, c. t.; Poth. 599; Dom. l. c.; C. N. 1279. [I. 105.]

1178. When novation is effected between the creditor and one of joint and several debtors, the privileges and hypothecs which attach to the ancient debt can be reserved only upon the property of the codebtor who contracts the new debt.—Poth. 599; C. N. 1280. [I. 105.]

1179. Joint and several debtors are discharged by novation effected between the creditor and one of the codebtors. — Novation effected with respect to the principal debtor discharges his sureties. —Nevertheless, if the creditor have stipulated in the first case, for the accession of the codebtors, and in the second, for that of the sureties, the ancient debt subsists if the codebtors or the sureties refuse to accede to the new contract. —Cod. L. 4, De fid. et mand.; Poth. 599; C. N. 1281. [I. 105.]

1180. The debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him although at the

time of the delegation he were ignorant of such exceptions.—The foregoing rule does not apply if at the time of the delegation nothing be due to the new creditor, and is without prejudice to the recourse of the debtor delegated against the party delegating him.—ff. L. 12 & L. 19, De nov. del.; Poth. 602; 3 Mal. 99. [I. 105.]

SECTION IV

Of release.

1181. The release of an obligation may be made either expressly or tacitly by persons legally capable of alienating.—It is made tacitly when the creditor voluntarily surrenders to his debtor the original title of the obligation, unless there is proof of a contrary intention.—ff. L. 2, § 1, De pac.; Poth. 608, 609, 619, 847; C. N. 1282. [I. 107.]

1182. The surrender of a thing given in pledge does not create a presumption of the release of the debt for which it was pledged.—ff. L. 3, De pac.; Cod. L. 2, De rem. pign.; Poth. 610; C. N. 1286. [I. 107.]

1183. The surrender of the original title of an obligation to one of joint and several debtors is available in favor of his codebtors.—ff. Arg. ex L. 2, De duo. reis const.; Poth. 608, 616; C. N. 1284. [I. 107.]

1184. An express release granted in favor of one of joint and several debtors does not discharge the others; but the creditor must deduct from the debt the share of him whom he has released.—ff. L. 16, De acceptil., L. 34, § 11, De solut. & lib.; Poth. 275, 556, 617, 621. C. N. 1285. [I. 107.]

1185. An express release granted to the principal debtor discharges his sureties.—If granted to the surety, it does not discharge the principal debtor.—If granted to one of several sureties it does not discharge the others, except in cases in which the latter would have a recourse upon the one released and to the extent of such recourse.—ff. L. 60, 68, § 2, de fid. et mand.; L. 23, De pac.; Poth. 616, 617; 4 Marc. 611, 612; C. N. 1287. [I. 107.]

1186. [That which the creditor receives from a surety as a consideration for releasing him from his suretyship is not imputed in discharge of the principal debtor, or of the other sureties, except as regards the latter, in cases in which they have a recourse upon the one released, and to the extent of such recourse.]—ff. L. 15, § 1, De fid. et mand.; Poth. 617, 618; C. N. 1288. [I. 109.]

SECTION V

Of compensation.

1187. When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared.—ff. L. 1, 2, 3, De comp.; Poth. 623; Dom. l. 4, t. 2, s. 1, n. 1--; C. N. 1289. [I, 109.]

1188. Compensation takes place by the sole operation of

law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality.—So soon as the debts exist simultaneously they are mutually extinguished in so far as their respective amounts correspond.—ff. L. 10, 11, 12, 7, 22, De comp.; L. 7, De solut.; C. P. 105; Dom. l. 4, t. 2, s. 1, n. 3, 4; s. 2, n. 2, 4; Poth. 538, 624, 626, 627, 628, 635, 637, 638; C. N. 1290, 1291. [I. 109.]

1189. Compensation is not prevented by a term granted by indulgence for the payment of one of the debts.—ff. L. 16, § 1, De comp.; Poth. 232, 627; C. P. 105; 1 Fer. C. P. 227; Arr. Lam. t. 28, a. 5; C. N. 1292. [I. 109.]

1190. Compensation takes place whatever be the cause or consideration of the debts or of either of them, except in the following cases:

1. The demand in restitution of a thing of which the owner has been unjustly deprived;

2. The demand in restitution of a deposit;

3. A debt which has for object an alimentary provision not liable to seizure.—Cod. L. 3, L. 14, De comp.; L. 11, Depos.; ff. L. 24, L. 25, § 1, L. 26, § 1, Depos.; L. 4, De agn. et al. lib.; Arr. Lam. t. 28, a. 7; Poth. 625; Dom. l. 1, t. 7, s. 3, n. 14; l. 4, t. 2. s. 2, n. 6; C. N. 1293. [I. 109.]

1191. The surety may avail himself of the compensation which takes place when the creditor owes the principal debtor. — But the principal debtor cannot set up in compensation what his creditor owes to the surety.—A joint and several debtor cannot set up in compensation what the creditor owes to his codebtor, except for the share of the latter in the joint and several debt.—ff. L. 4 & 5, De comp. L. 23, c. t., L. 10, De duo. reis const.; Cod. L. 9, L. 18, § 1, De comp.; Arr. Lam. t. 27, a. 9; Dom. l. 3, t. 3, s. 1, a. 8; Poth. 274, 631; 7 Toul. 377; C. N. 1294. [I. 109.]

1192. A debtor who accepts purely and simply an assignment made by the creditor to a third person, cannot afterwards set up against the assignee the compensation which he might before the acceptance have set up against the assignor.—An assignment not accepted by the debtor, but of which due notification has been given to him, prevents compensation only of the debts due by the assignor posterior to such notification.—Arr. P. P. 13th Aug. 1591; Poth. Ob. 632, Vente, 558; C. N. 1295. [I. 111.]

1193. When the two debts are payable at different places, compensation cannot be set up without allowing for the expenses of remittance.—ff. L. 15, De comp.; Poth. 633; Dom. l. 4, t. 2, s. 2, n. 8; C. N. 1296. [I. 111.]

1194. When compensation by the sole operation of law is prevented by any of the causes declared in this section, or by others of a like nature, the

party in whose favor alone the cause of objection exists, may demand the compensation by exception; and in such case the compensation takes place from the time of pleading the exception only.—Poth. 626, 636; 7 Toul. 396; 4 Marc. 640. [I. 111.]

1195. When there are several debts subject to compensation due by the same person, the compensation is governed by the rules provided for the imputation of payments. ff. L. 1, L. 5, § 1, L. 102, § 1, L. 3 & 94, § fin., L. 4, 7, 97, 103, c. t.; Poth. 638; C. N. 1297. [I. 111.]

1196. Compensation does not take place to the prejudice of rights acquired by third parties.—7 Toul. 381, 394; 12 Dur. 442, 443; C. N. 1298. [I. 111.]

1197. He who pays a debt which is of right extinguished by compensation cannot afterwards in enforcing the debt which he has failed to set up in compensation avail himself, to the prejudice of third parties, of the privileges and hypothecs attached to such debt, unless there were just grounds for his ignorance of its existence at the time of payment.—ff. L. 10, § 1, De comp.; Cod. L. 1, De cond. ind.; Poth. 639, 640; C. N. 1299. [I. 111.]

SECTION VI.

Of confusion.

1198. When the qualities of creditor and debtor are united in the same person, there arises a confusion which extinguishes the obligation; nevertheless in certain cases when confusion ceases to exist, its effects cease also.—ff. L. 50, De fid. et mand.; L. 95, § 2, De solut. et lib.; Cod. L. 6, De hered. act.; Poth. 639, 640. C. N. 1300. [I. 113; III. 381.]

1199. The confusion which takes place by the concurrence of the qualities of creditor and principal debtor in the same person, avails the sureties.—That which takes place by the concurrence of the qualities of surety and creditor or of surety and principal debtor does not extinguish the principal obligation.—ff. L. 38, § 1, De fid. et mand., L. 34, § 8, De solut., L. 129, § 1, De reg. jur.; Poth. 340, 644, 645; C. N. 1301. [I. 113.]

SECTION VII.

Of the performance of the obligation becoming impossible.

1200. When the certain specific thing which is the object of an obligation perishes, or the delivery of it becomes from any other cause impossible, without any act or fault of the debtor, and before he is in default, the obligation is extinguished; it is also extinguished although the debtor be in default, if the thing would equally have perished in the possession of the creditor; unless in either of the above mentioned cases the debtor has expressly bound himself for fortuitous events.—The debtor must prove the fortuitous

event which he alleges.—The destruction of a thing stolen or the impossibility of delivering it does not discharge him who stole the thing, or him who knowingly received it, from the obligation to pay its value.—ff. L. 33, 37, 51, L. 82, § 1, L. 136, De verb. ob., L. 47, § 6, De leg., L, 15, § 3, De rei vind., L. 7, § 2, L. 12, De cond. furt.; Poth. 649, 650, 656, 657, 660-668, Vente, 56-58; C. N. 1302. [I. 113.]

1201. When the performance of an obligation has become impossible, without any act or fault of the debtor, he is bound to assign to the creditor such rights of indemnity as he may possess relating to the obligation.—Poth. 669, 670, Vente, 56, 57, 59; C. N. 1303. [I. 113.]

1202. When the performance of an obligation to do has become impossible without any act or fault of the debtor and before he is in default, the obligation is extinguished and both parties are liberated; but if the obligation be beneficially performed in part, the creditor is bound to the extent of the benefit actually received by him.—4 Marc. 650; 7 Toul. 642. [I. 113.]

CHAPTER NINTH.

OF PROOF.

SECTION I.

General provisions.

1203. The party who claims the performance of an obligation must prove it.—On the the other hand he who alleges facts in avoidance or extinction of the obligation must prove them; subject nevertheless to the special rules declared in this chapter.—Cod. L. 1, L. 4, De prob.; ff. L. 19, 21-23, De prob., L. 1, De excep. 44, 1; Poth. Ob. n. 729; Id. C.R. n. 155; 1 Dom. l. 3, t. 6, s. 1, n. 4, 5; C. N. 1315. [I. 115.]

1204. The proof produced must be the best of which the case in its nature is susceptible.—Secondary or inferior proof cannot be received unless it is first shown that the best or primary proof cannot be produced. — Glf. Ev. n. 82, 84 & c. 4, bk. 2. [I. 115.]

1205. Proof may be made by writings, by testimony, by presumptions, by the confession of the party or by his oath, according to the rules declared in this chapter and in the manner provided in the Code of Civil Procedure.—C. N. 1316. [I. 115.]

1206. The rules declared in this chapter, unless expressly or by their nature limited, apply in commercial as well as in other matters.—When no provision is found in this code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.—C. S. L. C. c. 82, s. 17. [I. 115.]

SECTION II.

Of proof by writings.

§ 1. *Of authentic writings.*

1207. The following writings executed or attested with

the requisite formalities by a public officer having authority to execute or attest the same in the place where he acts, are authentic and make proof of their contents without any evidence of the signature or seal appended to them, or of the official character of such officer being necessary, that is to say:—Copies of the acts of the imperial parliament and of the parliament of this province, and copies of the Edicts and Ordinances, and of the ordinances of the Province of Quebec, and of the statutes and ordinances of the Province of Lower Canada, and of the statutes of Upper Canada, printed by the printer duly authorized by Her Majesty the Queen, or by any of her predecessors;—C. S. C. c. 80; c. 5, s. 6, n. 27, s.14, n. 1, 2. [I. 115.]—Letters-patent, commissions, proclamations and other instruments issued by Her Majesty the Queen, or by the executive government of the province;—Poth. Ob. 730, 731; Guy. Authentique, n. 34-36; 8 Toul. n. 34-6; 1 Glf. Ev. n. 470, 479, 480; 1 Tay. Ev. § 1368. [I. 115.]—Official announcements in the Canada Gazette published by authority;—1 Glf. Ev. n. 492. [I. 117.] — The records, registers, journals and public documents of the several departments of the executive government and of the parliament of this province;—1 Glf. Ev. 480-3; 22 V. c. 80, s. 5. [I. 117.]—The records and registers of courts of justice and of judicial proceedings in Lower Canada;—C. S. C. c. 80, s. 5. [I. 117.]—All books and registers of a public character required by law to be kept by official persons in Lower Canada;—Ib.—The books, registers, by-laws, records and other documents and papers of municipal corporations and of other corporations of a public character in this province;—C. S. L. C. c. 24, s. 20, n. 3, 4; C. S. C. c. 80, s. 5, 6; 1 Glf. Ev. 484. [I. 117.]—Official copies and extracts of and from the books and writings above mentioned, certificates, and all other writings executed or attested in Lower Canada, which are included within the legal intendment of this article although not enumerated.—C. S. C. c. 80, s. 5. [I. 117.]

1208. [A notarial instrument received before one notary is authentic if signed by all the parties.—If the parties or any of them be unable to sign, it is necessary to the authenticity of the instrument that it be received by one notary, in the actual presence of another subscribing notary, or of a subscribing witness. — The witnesses must be males not less than twenty-one years of age, of sound mind, not related to either of the parties within the degree of cousin-german, without interest in the instrument, not civilly dead, and not deemed infamous by law. Aliens may act as such witnesses.]—This article is subject to the provisions contained in the next following article, and to those relating to wills. It does not apply to the cases mentioned in article 2380, where a notary

alone is sufficient.—Poth. Ob. 732; 2 Jou. A. J. 385 --; O. 1498, 1507, 1543; O. Bl. a. 166; Drion, c. 1, p. 48, c. 3, p. 75 --; [I. 117; III. 381.]

1209. Notifications, protests and services may be made by one notary, at the request of a party whether such party has or has not accompanied him or signed the act.—Such instruments are authentic and make proof of their contents until contradicted or disavowed.—But nothing inserted in any such instrument as the answer of the party upon whom the same is served is proof against him, unless it is signed by such party.—C. S. L. C. c. 73, s. 27. [I. 117.]

1210. An authentic writing makes complete proof between the parties to it and their heirs and legal representatives:

1. Of the obligation expressed in it;

2. Of what is expressed in it by way of recital, if the recital have a direct reference to the obligation or to the object of the parties in executing the instrument. If the recital be foreign to such obligation and to the object of the parties in executing the instrument, it can serve only as a commencement of proof.—Poth. Ob. 735-737; Dum. C. P. 558, § 8, gl. 1, n. 10; C. N. 1319, 1320. [I. 117.]

1211. An authentic writing may be contradicted and set aside as false in whole or in part, upon an improbation in the manner provided in the Code of Civil Procedure and in no other manner.—[I. 119.]

1212. Counter-letters have effect between the parties to them only; they do not make proof against third persons.—ff. L. 27, § 5, De pac.; Cod. L. 2, Plus val. q. ag.; Dom. l. 3, t. 6, s. 2, n. 14, 15; 8 Toul. 182 --; 2 Char. Dol, n. 51; C. N. 1321. [I. 119.]

1213. Acts of recognition do not make proof of the primordial title, unless the substance of the latter is specially set forth in the recognition.—Whatever the recognition contains over and above the primordial title, or different from it, does not make proof against it.—Nov. 119, c. 3; Poth. Ob. 777, 779; Id. Rente, 147-149, 153; C. N. 1337. [I. 119.]

1214. The act of ratification or confirmation of an obligation which is voidable does not make proof unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity.—C. N. 1338. [I. 119.]

§ 2. *Of copies of authentic writings.*

1215. Copies of notarial instruments, certified to be true copies of the original, by the notary or other public officer, who has the legal custody of such original, are authentic and make proof of what is contained in the original.—Poth. Ob. 755 --; C. S. L. C. c. 73, s. 31, n. 8; C. N. 1334. [I. 119.]

1216. Extracts duly certified and delivered by notaries or by the prothonotaries of the Superior Court from the

originals of authentic instruments lawfully in their custody are authentic and make proof of their contents; provided such extracts contain the date, place of execution and nature of the instrument, the names and description of the parties to it, the name of the notary before whom it was received, the clauses or parts of clauses extracted at full length, and that mention be made of the day on which the extract is delivered and be noted on the originals.—C. S. L. C. c. 73, s. 28; C. N. 1336. [I. 119.]

1217. When the original of any notarial instrument has been lost by unforeseen accident, a copy of an authentic copy thereof makes proof of the contents of the original, provided that such copy be attested by the notary or other public officer with whom the authentic copy has been deposited by judicial authority for the purpose of granting copies thereof, as provided in the Code of Civil Procedure.—Poth. Ob. 766-775; Imb. l. 1, c. 47, n. 4, p. 321; C. N. 1335. [I. 119.]

1218. Copies of notarial instruments and of extracts therefrom, of all authentic documents, whether judicial or not, of papers of record, and of all documents and instruments in writing, even those under private signature, or executed before witnesses, lawfully registered at full length, when such copies bear the certificate of the registrar, are authentic evidence of such documents, if the originals have been destroyed by fire or other accident, or otherwise lost—Poth. Ob. 772-3; Boic. pt. 1, c. 11; C. N. 1336. [I. 121; III. 381.]

1219. If in such cases the original document be in the possession of an adverse party, or of a third party, without collusion on the part of the person who relies upon it, and it cannot be produced, the copy certified as in the preceding article makes proof in like manner.—C. S. L. C. c. 37, s. 20, p. 349; Poth. Ob. 772, 773. [I. 121; III. 381.]

§ 3. *Of certain writings executed out of Lower Canada.*

1220. The certificate of the secretary of any foreign state or of the executive government thereof, and the original documents and copies of documents hereinafter enumerated, executed out of Lower Canada, make *primâ facie* proof of the contents thereof without any evidence being necessary of the seal or signature affixed to such original or copy, or of the authority of the officer granting the same, namely:—C. S. L. C. c. 90, s. 4.

1. Exemplifications of any judgment or other judicial proceeding of any court out of Lower Canada, under the seal of such court, or under the signature of the officer having the legal custody of the record of such judgment or other judicial proceeding;—Ib. s. 5. [I. 121.]

2. Exemplifications of any will executed out of Lower Canada, under the seal of

the court wherein the original will is of record, or under the signature of the judge or other officer having the legal custody of such will, and the probate of such will under the seal of the court;—Ib. s. 6.

3. Copies of the exemplification of such will and of the probate thereof certified by the prothonotary of any court in Lower Canada, in whose office the exemplification and probate have been recorded, at the instance of an interested party and by the order of a judge of such court; such probate is also received as proof of the death of the testator;—Ib. s. 5.

4. Certificates of marriage, baptism or birth, and burial of persons out of Lower Canada, under the hand of the clergyman or public officer who officiated, and extracts from any register of such marriage, baptism or birth, and burial, certified by the clergyman or public officer having the legal custody thereof;—Ib. s. 3.

5. Notarial copies of any power of attorney executed out of Lower Canada, in the presence of one or more witnesses and authenticated before the mayor of the place or other public officer of the country where it bears date, the original whereof is deposited with the notary public in Lower Canada granting the copy;—Ib. s. 8.

6. The copy taken by a prothonotary or a clerk of a circuit court in Lower Canada of any power of attorney executed out of Lower Canada in the presence of one or more witnesses and authenticated before any mayor or other public officer of the country where it bears date, such copy being taken in a cause wherein the original is produced by a witness who refuses to part with it, and being certified and deposited in the same cause;—Ib. s. 11.—The original powers of attorney mentioned in the preceding paragraphs numbers five and six, are held to be duly proved; but the truth of the exemplifications, probates, certificates or extracts, and the original powers of attorney mentioned in this article, may be denied and proof thereof be required in the manner provided in the Code of Civil Procedure.—Ib. s. 7, 9, 12. [I. 121; III. 383.]

§ 4. *Of private writings.*

1221. A writing which is not authentic by reason of any defect of form, or of the incompetency of the officer, avails as a private writing, if it have been signed by all the parties; saving the provisions contained in article 895. [I. 123; III. 383.]

1222. Private writings acknowledged by the party against whom they are set up, or legally held to be acknowledged or proved, have the same effect in making proof between the parties thereto, and between their heirs and legal representatives, as authentic writings.—Poth. Ob. 742, 3; C. S. L. C. c. 83, § 2, s. 86; C. N. 1322. [I. 123.]

1223. If the party against

whom a private writing is set up do not formally deny his writing or signature in the manner provided in the Code of Civil Procedure, it is held to be acknowledged. His heirs or legal representatives are only obliged to declare that they do not know his writing or signature.—C. S. L. C. c. 83, s. 86; C. N. 1324. [I. 123.]

1224. In the case of formal denial by a party of his writing or signature, or in the case of a declaration by his heirs or legal representatives that they do not know it, proof must be made in the manner provided in the Code of Civil Procedure. —C. N. 1324. [I. 123.]

1225. Private writings have no date against third persons but from the time of their registration, or from the death of one of the subscribing parties or witnesses, or from the day that the substance of the writing has been set forth in an authentic instrument.—The date may nevertheless be established against third persons by legal proof.—Poth. Ob. 750; C. S. L. C. p. 349-50; 5 Marc. 56-58; 10 P. Fr. 345; C. N. 1328. [I. 123.]

1226. The rule declared in the last preceding article does not apply to writings of a commercial nature. Such writings are presumed to have been made on the day they bear date, in the absence of proof to the contrary.—1 Tay. 153, n. 137; 3 L. C. R. Hays & David; 1 Nou. 82. [I. 123; III. 383.]

1227. Family registers and papers do not make proof in favor of him by whom they are written. They are proof against him:

1. In all cases in which they formally declare a payment received;

2. When they contain express mention that a minute is made to supply a defect of title to a person in whose favor an obligation is declared to exist.—Cod. L. 7, De prob.; Poth. Ob. 758, 759; Boic. pt. 2, c. 8, n. 14; C. N. 1331. [I. 123.]

1228. What is written by the creditor on the back or upon any other part of the title which has always remained in his possession, though the writing be neither signed nor dated, is proof against him when it tends to establish the discharge of the debtor.—In like manner what is written by the creditor on the back or upon any other part of the duplicate of a title or of a receipt is proof, provided such duplicate be in the hands of the debtor.—Poth. Ob. 760, 761; C. N. 1332. [I. 125.]

1229. No indorsement or memorandum of any payment upon a promissory note, bill of exchange or other writing, made by or on behalf of the party to whom such payment is made, is received in proof of such payment so as to take the debt out of the operation of the law respecting the limitation of actions.—C. S. C. c. 67, s. 4. [I. 125.]

SECTION III.

Of testimony.

1230. The testimony of one witness is sufficient in all cases

in which proof by testimony is admitted.—C. S. L. C. c. 82, s. 16, p. 698. [I. 125.]

1231. All persons are legally competent to give testimony, except:

1. Persons deficient in understanding, whether from immaturity of age, insanity or other cause;

2. Those insensible to the religious obligation of an oath;

3. Those civilly dead;

4. Those declared infamous by law;

5. Husband and wife, for or against each other. — Poth. 823; C. S. L. C. Ib. s. 14; 1 Glf. Ev. 365, 368, 572; Tay. 1091. [I. 125.]

1233 Testimony given by a party in a suit cannot avail in his favor.—A witness is not rendered incompetent by reason of relationship or of being interested in the suit; but his credibility may be affected thereby.—Glf. Ev. n. 365 --, c. 4, pt. 2, c. 2, pt. 3; C. S. L. C. Ib. s. 14, 16. [I. 125.]

1233. Proof may be made by testimony:

1. Of all facts concerning commercial matters;

2. In all matters in which the principal sum of money or value in question does not exceed [fifty dollars;]

3. In cases in which real property is held by permission of the proprietor without lease, as provided in the title *Of Lease and Hire;*

4. In cases of necessary deposits, or deposits made by travellers in an inn, and in other cases of a like nature;

5. In cases of obligations arising from quasi-contracts, offences, and quasi-offences, and all other cases in which the party claiming could not procure proof in writing;

6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced;

7. In cases in which there is a commencement of proof in writing.—In all other matters proof must be made by writing or by the oath of the adverse party.—The whole, nevertheless, subject to the exceptions and limitations specially declared in this section, and to the provisions contained in article 1690.—C. S. L. C. 698, 699, 400; O. Moul. a. 54; O. 1667, t. 20, a. 2, 3, 4; 9 Toul. n. 20, 26; 3 Zach. § 596, p. 517, *n.* 1; Bor. n. 99; 5 Marc. 1341, p. 100; Poth. Ob. 772, 801, 809-815; Merl. Preuve, s. 2, § 3, a. 1, n. 16; Serp. O. 1667, p. 317, 318; Glf. Ev. s. 558, s. 84, n. 2; C. N. 1341. [I. 125; III. 383.]

1234. Testimony cannot in any case, be received to contradict or vary the terms of a valid written instrument.—Cod. L. 1, De test; Dom. l. 2, t. 6, s. 2, n. 7; Poth. Ob. 793; O. 1667, t. 20, a. 2; 1 Glf. Ev. n. 275 --; C. N. 2341. [I. 127.]

1235. In commercial matters in which the sum of money or value in question exceeds [fifty dollars,] no action or exception can be maintained against any party or his representatives unless there is a

writing signed by the former, in the following cases:

1. Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions;

2. Upon any promise or ratification made by a person of the age of majority, of any obligation contracted during his minority;

3. Upon any representation, or assurance in favor of a person to enable him to obtain credit, money or goods thereupon;

4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain;—The foregoing rule applies although the goods be intended to be delivered at some future time or be not at the time of the contract ready for delivery.—C. S. L. C. c. 67, s. 2, 6-8; I. S. 29 Car. II, c. 3, s. 17. [I. 127.]

1236. In any action for the recovery of a sum which does not exceed [fifty dollars,] proof by testimony cannot be received if such sum be a balance or make part of a debt under a contract which cannot be proved by testimony.—The creditor may, nevertheless, prove by testimony a promise made by the debtor to pay such balance, when it does not exceed [fifty dollars.]—C. N. 1344. [I. 129.]

1237. [If in the same action several sums be demanded which united form a sum exceeding fifty dollars, proof by testimony may be received if the debts have arisen from different causes or have been contracted at different times, and each were originally for a sum less than fifty dollars.] —O. 1667, t. 17, a. 4; P. V. C. 217; C. N. 1345. [I. 129.]

SECTION IV.

Of presumptions.

1238. Presumptions are either established by law or arise from facts which are left to the discretion of the courts. —1 Cuj. in parat., ad t. 3, ff. L. 22, p. 678; Poth. Ob. 840; C. N. 1349. [I. 129.]

1239. Legal presumptions are those which are specially attached by law to certain facts. They exempt from making other proof those in whose favor they exist; certain of them may be contradicted by other proof; others are presumptions *juris et de jure* and cannot be contradicted.—Cuj. l. c., 6 Cuj. ad. t. 23, De præsumpt. 869; Men. l. 1, q. 3, 1; Poth. Ob. 481-3; C. N. 1352. [I. 129.]

1240. No proof is admitted to contradict a legal presumption, when, on the ground of such presumption, the law annuls certain instruments or disallows a suit, unless the law has reserved the right of making proof to the contrary, and saving what is provided with respect to the oaths or judicial admissions of a party.—Men. l. 1, q. 3, 18; Poth, Ob. 841-3, 886,8; 10 Toul. 50; C. N. 1352. [I. 131.]

1241. The authority of a

final judgment (*res judicata*) is a presumption *juris et de jure*; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.—ff. De excep. rei jud.; Poth. Ob. 61, 888, 897; 10 Toul. 88; C. N. 1351. [I. 131.]

1242. Presumptions not established by law are left to the discretion and judgment of the court.—Men. l. 1, q. 44; Poth. Ob. 849; 10 Toul. 29; C. N. 1353. [I. 131.]

SECTION V.

Of admissions.

1243. Admissions are extra-judicial or judicial. They cannot be divided against the party making them.—9 Cuj. C. 1013, D; 10 Toul. 383; C. N. 1354. [I. 131.]

1244. An extra-judicial admission must be proved by writing or the oath of the party against whom it is set up, except in the cases in which, according to the rules declared in this chapter, proof by testimony is admissible.—Poth. Ob. 834; 9 Toul. 396; 10 Id. 406; C. N. 1355. [I. 131.]

1245. A judicial admission is complete proof against the party making it.—It cannot be revoked unless it is proved to have been made through an error of fact.—ff. L. 1, 2, 4, De conf., L. 25, De prob.; Men. præs. 51, l. 2, q. 39; Poth. Ob. 833; 10 Toul. 383, 11 Id. 79; C. N. 1356. [I. 131.]

SECTION VI.

Of the oaths of parties.

1246. A party may be examined under oath in like manner as a witness, or upon interrogatories on articulated facts or by decisory oath. And the court may, in its discretion, examine the parties or either of them in order to complete imperfect proof—C. S. L. C. c. 32, s. 15, 19, 20; ff. De jurej.; Cod. De reb. cred.; Poth. Ob. 911, 912; 10 Toul. 474; C. N. 1357. [I. 131.]

§ 1. *Of the decisory oath.*

1247. The decisory oath may be offered by either of the parties to the other, in any action in which the parties may legally bind themselves by admission or compromise, and without any commencement of proof.—ff. L. 34, § 6, De jurej.; Cod. L. 12, De reb. cred.; Cuj. obs. 22, n. 28, col. 607; C. N. 1358, 1360. [I. 133.]

1248. It can only be offered upon a fact which is personal to the party to whom it is offered, or of which he has a personal knowledge.—ff. L. 34, § 3, De jurej.; Poth. Ob. 912, 914; C. N. 1359. [I. 133.]

1249. He to whom the decisory oath is offered and who refuses to take it, and does not refer it to his adversary, or the adversary who refuses to take it, when it is referred to him, fails in his demand or exception.—ff. L. 34, § 6, 7, L. 38, De jurej.; Poth. Ob. 916; C. N. 1361. [I. 133.]

1250. The oath cannot be referred when the fact which is the object of it is not personal or personally known to both the parties, but to him alone to whom it has been offered.—ff. L. 34, § 1 & 3, De jurejur.; Poth. 916; C. N. 1362. [I. 133.]

1251. When a party to whom the decisory oath has been offered or referred has made his declaration under it, the adverse party is not admitted to prove its falsity.—ff. L. 5, § 2, L. 9, § 1, De jurej.; ff. L. 15, De except.; Poth. Ob. 915; C. N. 1363. [I. 133.]

1252. A party who has offered or referred the decisory oath cannot retract after a declaration by the adverse party that he is ready to take the oath.—Cod., De reb. cred., L. 11; Poth. Ob. 915; C. N. 1364. [I. 133.]

1253. The decisory oath cannot affect the rights of third persons, and it extends only to the things with respect to which it has been offered or referred.—[If offered by one of joint and several creditors to the debtor, it avails the latter for the part only of such creditor, subject, nevertheless, to the special rules applicable to commercial partnerships.]—If offered to the principal debtor it avails his sureties.—If offered to one of joint and several debtors, it avails his codebtors.—If offered to a surety it avails the principal debtor.—In the last two cases the oath of the codebtor or of the surety avails the other codebtors or the principal debtor only when it has been offered upon the fact of the debt and not solely upon the fact of the joint and several liability or of the suretyship.—ff. L. 10, De jurej., ff. L. 27, L. 28, De jurej.; Poth. Ob. 917, 918; 10 Toul. 504, 5; C. N. 133, 1198, 1365. [I. 133.]

§ 2. *Of the oath put officially.*

1254. The court may, in its discretion, examine either of the parties on oath, in order to complete the proof necessary for the decision of the cause, or for determining the amount for which judgment ought to be given; but only in cases where some proof has been made of the demand or exception.—ff. L. 1, De jurej.; Cod. L. 3, De reb. cred.; Vin. Q. S. l. 1, c. 44; Poth. Ob. 922; C. N. 1367. [I. 135.]

1255. The oath put by the court officially to one of the parties cannot be referred by him to the other party.—Vin. l. 1, c. 43; Poth. Ob. 929; C. N. 1368. [I. 135.]

1256. The oath, upon the value of the thing demanded can only be put by the court officially to the party claiming when it is impossible to establish such value otherwise.—C. N. 1369. [I. 135.]

TITLE FOURTH.

OF MARRIAGE COVENANTS AND OF THE EFFECT OF MARRIAGE UPON THE PROPERTY OF THE CONSORTS.

CHAPTER FIRST.

GENERAL PROVISIONS.

1257. All kinds of agreements, may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death.—Leb. Com. l. 1, c. 3, n. 4; Ren. Com. pt. 1, c. 4, n. 1; Poth. Com. intr. n. 1, 4, 6, C. O. t. 10, n. 34; 11 P. Fr. 222 --; C. N. 1387. [II. 399.]

1258. All covenants contrary to public order or to good morals, or forbidden by any prohibitory law, are, however, excepted from the above rule. —Author. under a. 1257; 11 P. Fr. 224--; C. N. 1387. [II. 399.]

1259. Thus the consorts cannot derogate from the rights incident to the authority of the husband over the persons of the wife and the children, or belonging to the husband as the head of the conjugal association, nor from the rights conferred upon the consorts by the title *Of Paternal Authority* and the title *Of Minority, Tutorship and Emancipation* in the present code.—ff. L. 28, L. 38, De pact., L. 5, § 7, De admin. et peric. tut., L. 5, L. 6, De pact. dot.; Poth. Com. n. 4-7, C. O. t. 10, n. 34; Merl. Renonciation, § 1, n. 3, Séparation de biens, s. 2, § 5, n. 8; 11 P. Fr. 225--; C. N. 1388. [II. 399.]

1260. If no covenants have been made, or if the contrary have not been stipulated, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property, and to the customary or legal dower in favor of the wife and of the children to be born of their marriage.—From the moment of the celebration of marriage, these presumed agreements become irrevocably the law between the parties, and can no longer be revoked or altered.—Poth. Com. intr. n. 18, al. 2, Com. n. 4, 6, 7, 10, 21, Ob. n. 844, Mar. n. 47, 393, C. O. t. 10, n. 32; C, N. 1393. [II. 401.]

1261. In the case of the preceding article, the community is established and governed in accordance with the rules set forth in the second chapter, and those relating to dower are laid down in the third chapter in the present title. [II. 401.]

1262. Community of property, which the consorts are free to exclude by stipulation, may be altered or modified at pleasure, by their contract of marriage, and is called, in such case, conventional community, the principal rules concerning which are contained in the second section of the second chapter of this title. [II. 401.]

1263. Legal or customary dower, which the parties are likewise at liberty to exclude, may also be altered or modified at pleasure, by the contract of marriage, and is called in such case, prefixed or conventional dower, the most ordinary rules concerning which are contained in the first section of the third chapter of this title. [II. 401.]

1264. All marriage covenants must be made in notarial form, and before the solemnizing of marriage, upon which they are conditional. — Contracts of marriage made in certain localities, for which an exception has been created by special laws, are exempted from the necessity of being in notarial form. — C. O. 202; Poth. Mar. n. 48, 396, Com. intr. n. 11, 12, C. O. t. 10, n. 32, 33; Merl. Don. s. 2, § 8, Test. s. 2, § 1, a. 4; C. N. 1394; C. S. L. C. c. 38, s. 13. [II. 401.]

1265. After marriage, the marriage covenants contained in the contract cannot be altered [even by the mutual donation of usufruct, which is abolished;] nor can the consorts in any other manner confer benefits *inter vivos* upon each other, except in conformity with the provisions of the act 29th Vict., ch. 17, under which a husband may, subject to the restrictions and conditions therein mentioned, insure his life for the benefit of his wife and children.—Lepr. cent. 1, c. 98; L. & B. let. M. c. 4; 4 J. A. 1. 8, c. 30; Lam. Arr. t. 32, a. 5; Poth. Mar. n. 48, Com. intr. n. 18, 19; C. N. 1395. [II. 401; III. 383.]

1266. Alterations made in marriage-covenants, before the celebration of the marriage, must, on pain of nullity, be established by act in notarial form, in the presence, and with the consent, of all such parties to the first contract as are interested in such alterations.— C. P. 258; C. O. 223; L. & B. let. C. c. 28; Poth. Com. intr. n. 13, 14, 16, Lam. arr. t. 32, a. 5, 6; C. N. 1396, 1397. [II. 401.]

1267. [Minors capable of contracting marriage, may validly make, in favor of their future consorts or children, all such agreements or gifts as the contract admits of, provided they are assisted by their tutors, if they have any, and by the other persons whose consent is necessary to the validity of the marriage; the benefits which they confer in such contracts upon third parties are subject to the rules which apply to minors in general.]—ff. L. 8, de pac. dot.; L. 61, L. 73, de ju. dot. L. & B. let. M, c. 9; Bac. D. J. c. 21, n. 390; Poth. Com. n. 103, 306, C. O. 10, n. 51; C. N. 1398. [II. 403.]

CHAPTER SECOND.

OF COMMUNITY OF PROPERTY.

1268. There are two kinds of community of property: legal community, the rules governing which are contained in the first section of this chapter, and conventional community, the principal and most usual conditions of which are declared in the second section of the same chapter.—Poth. Com. 4, 9, 10 --. [II. 403.]

1269. [Community, whether legal or conventional, commences from the day the marriage is solemnized; the parties cannot stipulate that it shall commence at any other period.] —C. P. 220; Dum. M. on 508; Poth. Com. 4, 22, 23, 275, t. 10, n. 32; Merl. Com. § 4, n. 1; C. N. 1399. [II. 403.]

SECTION I.

Of legal community.

1270. Legal community is that which the law, in the absence of stipulation to the contrary, establishes between consorts, by the mere fact of their marriage, in respect of certain descriptions of property, which they are presumed to have intended to subject to it.—Poth. Com. 10. [II. 403.]

1271. Legal community may be established by the simple declaration which the parties make in the contract of their intention that it shall exist. It also takes place when no mention is made of it, when it is not expressly nor impliedly excluded, and also when there is no marriage contract. In all cases it is governed by the rules set forth in the following articles.—Poth. 279; 3 Delv. 9; C. N. 1400. [II. 403.]

§ 1. *What things compose the assets and liabilities of the community.*

1272. The assets of the community consist:

1. Of all the moveable property which the consorts possess on the day when the marriage is solemnized, and also of all the moveable property which they acquire during marriage, or which falls to them, during that period, by succession or by gift, if the donor or testator have not otherwise provided;

2. Of all the fruits, revenues, interests, and arrears, of whatsoever nature they may be, which fall due or are received during the marriage, and arise from property which belonged to the consorts at the time of their marriage, or from property which has accrued to them during marriage, by any title whatever;

3. Of all the immoveables they acquire during the marriage.—C. P. 220; Leb. Com. l. 1, c. 5, dist. 1, n. 1, 2, 3; Poth. Com. 25, 26, 100, 102, 185, 182, 204, 206, 208, 232, 264, 265, 268, C. O. t. 10, n. 6 - 8, 23, P. mar. 90; Merl. Com. § 1, n. 4, § 4, n. 2; 11 P. Fr. 263 --; Fen. Poth. 227-8; Tr. Mar. n. 605; C. N. 1401. [II. 403.]

1273. All immoveables are deemed to be joint acquests of the community, if they be not proved to have belonged to one

of the consorts, or to have been in his legal possession, previously to the marriage, or to have fallen to him subsequently by succession or other equivalent title.—ff. L. 51, De don. int. v. et ux; C. P. 278; Leb. Com. l. 1, c. 5, dist. 3, n. 2; Bour. l. 3, t. 10, pt. 2, c. 10; Poth. Com. 106, 107, 113, 121, 122, 123, 130, 203; 11 P. Fr. 289; C. N. 1402. [II. 405.]

1274. Mines and quarries are subject as regards community, to the rules laid down concerning them, in the title *Of Usufruct, Use and Habitation*.—The product of such mines and quarries as are opened during the marriage, upon the private property of one of the consorts, does not fall into the community; but such as were opened and worked previously to the marriage, may continue to be worked for the benefit of the community.—ff. L. 9, De u. et quem.; L. 7 de sol. matr.; L. 18, De f. dot.; Leb. Com. l. 1, c. 5, s. 2, dist. 2; Poth. Com. 97, 98, 204, 207, 210, 649, C. O. 100, 123; 11 P. Fr. 290 --; C. 460; C. N. 1403. [II. 405.]

1275. The immoveables which the consorts possess on the day when the marriage is solemnized, or which fall to them during its continuance, by succession or an equivalent title, do not enter into the community.—Nevertheless, if, after the contract of marriage in which community is stipulated, and before the marriage is solemnized, one of the consorts purchase an immoveable, the immoveable purchased in such interval, falls into the community; unless the purchase has been made in execution of some clause of the contract, in which case it is regulated according to the agreement.—ff. L. 9, L. 73, pro soc.; L. 45, de adq. vel om. her; C. P. 246; Leb. l. 1, c. 4, n. 9; 2 Lau. C. P. 247 --; Poth. Com. 140, 141, 157, 185, 197, 281, 603, 604, C. O. t. 10, n. 9, 112; Ren. c. 3, n. 2; 3 Mal. 191; 11 P. Fr. 240 --; C. N. 1404. [II. 405.]

1276. Gifts by contract of marriage, those which are in contemplation of death included, gifts during marriage, and legacies, made by ascendants of one of the consorts, either to the consort entitled to inherit from them or to the other, are deemed, as regards immoveables, unless there is an express declaration to the contrary, to be made to the consort entitled to inherit, and are his private property, as being acquired under a title equivalent to succession.—The same rule applies even when the gift or the legacy, in its terms, is made to both consorts jointly.—All gifts and legacies thus made to the consorts jointly, or to one of them, by others than ascendants, come under the contrary rule, and fall into the community, unless they have been expressly excluded.—C. P. 246; C. O. 211; Poth. Com. 137, 149, 158, 168, 169, 170; 3 Mal. 192; 11 P. Fr. 314 --; Tr. Mar. 602-3; C. N. 1405. [II. 405.]

1277. Immoveables abandoned or ceded to one of the consorts, by his father or

mother, or any other ascendant, either in satisfaction of debts due him by the latter, or subject to the payment of the debts due by the donor to strangers, do not fall into the community; saving compensation or indemnity.—Poth. Com. 130-132, 134, 136, 139, 168, 171, 172, 627; 11 P. Fr. 324; C. N. 1406. [II. 407.]

1278. Immoveables acquired during marriage, in exchange for others which belong to one of the consorts, do not enter into the community, and are substituted in the place and stead of the immoveables thus alienated; saving compensation if a difference have been paid.—ff. L. 26, L. 27, De ju. dot.; Leb. Com. l. 2, c. 5, dist. 2, n. 12; Poth. Com. 197; Darg. C. Br. 418; 2 Mal. 193; 11 P. Fr. 326; C. N. 1407. [II. 407.]

1279. A purchase made during marriage, under title of licitation, or otherwise, of a portion of an immoveable, in which one of the consorts owned an undivided share, does not constitute a joint acquest; saving the right of the community to be indemnified for the amount withdrawn from it, to make such purchase. —Where the husband, alone and in his own individual name, acquires by purchase or by adjudication, part or the whole of an immoveable, in which the wife owned an undivided share, she has the option, at the dissolution of the community, either of abandoning the immoveable to the community, which then becomes her debtor for her share in the price, or of taking back the immoveable and refunding to the community the price of the purchase.—ff. de ju. dot.; Poth. Com. 140, 145, 146, 150, 151-153, 156, 629; 2 Mal. 194; 11 P. Fr. 327 --; C. N. 1408. [II. 407.]

1280. The liabilities of the community consist:

1. Of all the moveable debts due by the consorts on the day when the marriage was solemnized, or by the successions which fall to them during its continuance; saving compensation for such as are connected with immoveables which are the private property of one or other of the consorts;

2. Of the debts, whether of capital sums, arrears, or interest, contracted by the husband during the community, or by the wife, with the consent of the husband; saving compensation in cases where it is due;

3. Of the arrears and interest only of such rents and debts as are personal to either of the two consorts;

4. Of the repairs which attach to the usufruct of such immoveables as do not fall into the community;

5. Of the maintenance of the consorts, of the education and support of the children, and of all the other charges of marriage.—C. P. 221; C. O. 187; Leb. l. 2, c. 3; 2 Lau. C. P. a. 221, p. 189; Poth. Com. 233, 237, 239, 241, 243, 247, 248, 254, 270, 271, C. O. t. 10, n. 24, 25, 27, 28, 113; 3 Mal. 105; 12 Toul. 329-348, 354-365; 11 P. Fr. 331 --; C. N. 1409. [II. 407.]

1281. The community is liable for the moveable debts contracted by the wife before marriage, only in so far as they are established by an authentic act anterior to the marriage, or by an act which before that event had acquired a certain date, either by means of registration or of the death of one or more of its signers, or other sufficient proof, except in commercial matters, in which proof may be made according to the provisions of articles 1233, 1234 and 1235.—Creditors of the wife, who claim under acts the date of which has not been established as above stated, cannot sue her for their payment, before the dissolution of the community. —The husband who claims to have paid a debt of this nature, for his wife, cannot demand repayment of it either from her or from her heirs.—C. P. 222; Poth. Com. 242, 259; N. D. Communauté; 3 Mal. 196; 11 P. Fr. 340 --; 12 Toul, 332; 3 Delv. 14; Tr. Mar. 772-3; C. 1225; C. N. 1410. [II. 407.]

1282. Debts due by a succession composed of moveable property only, which has fallen to the consorts during marriage, are entirely chargeable to the community.—C. P. 221; C. O. 187; Poth. Com. 261-3, Suc. c. 5, a. 2, § 2, al. 6, 7, C. O. t. 17, n. 112; 3 Mal. 196; 11 P. Fr. 345; 12 Toul. 409; C. N. 1411. [II. 409.]

1283. Debts due by a succession composed of immoveables only, which falls to one of the consorts during marriage, are not chargeable to the community; saving the right of the creditors to be paid out of the immoveables of the succession.—Nevertheless, if such succession have fallen to the husband, the creditors have a right to be paid either out of his private property or even out of that of the community; saving, in the second case, the compensation due to the wife or her heirs.—Ren. Com. pt. 1, c. 12, n. 29; Lam. Arr. t. 32, a. 22; Poth. Com. 260, 261, 263, C. O. t. 10, n. 29; 11 P. Fr. 345; 3 Delv. 15; 12 Toul. 411; C. N. 1412. [II. 409.]

1284. If a succession composed of immoveables only have fallen to the wife, and she have accepted it with the consent of her husband, the creditors have a right to be paid out of all the property which belongs to her; but if she have accepted it only under judicial authorization, upon the refusal of the husband, the creditors, in case the property of the succession proves insufficient, have no recourse upon her other property until the dissolution of the community. —Leb. Com. l. 2, c. 3, s. 2, dist. 3, n. 7, 15, 16; Chop. C. P. l. 2, t. 1, n. 15; Ren. Com. pt. 1, c. 12, n. 20, 24, 25; Poth. C. O. t. 10, n. 29; 3 Mal. 197; 11 P. Fr. 347; 12 Toul. 412; C. N. 1413. [II. 409.]

1285. When a succession which has fallen to one of the consorts consists partly of moveable property and partly of immoveables, the debts due by such succession are chargeable to the community to the

extent only of the portion of the debts to the payment of which the moveable property is liable to contribute, regard being had to the value of such property as compared with that of the immoveables. — Such contributory portion is determined according to the inventory which the husband is bound to make, either in his own right, if the succession concern him personally, or as directing and authorizing the actions of his wife, if the succession be one that has fallen to her.—Leb. Com. l. 2, c. 3, s. 2, dist. 3, n. 4, 6, 7, 11; Dup. C. P. Com. l. 1, c. 5, s. 3; Ren. Com. pt. 1, c. 12, n. 11; Poth. Suc. c. 5, a. 2, § 2, al. 8, Com. 264 - 267, C. O. t. 10, n. 29 & 264; 3 Mal. 198-9; 11 P. Fr. 349 --; C. N. 1414. [II. 409.]

1286. In the absence of an inventory, and in all cases where the omission to make one is prejudicial to the wife, she or her heirs may, at the dissolution of the community, sue for lawful compensation, and even make proof, either by deeds and private writings, or by witnesses, and, if necessary, by general rumor, of the description and value of the moveable property not inventoried. —C. Bl. 183; C. Br. 584; Cat. l. 8, c. 3; Lap. Inventaire, 186; 3 Mal. 190 --; 11 P. Fr. 351; 3 Delv. 16; 12 Toul. 425; C. N. 1415. [II. 409.]

1287. The provisions of article 1285 do not deprive the creditors of a succession composed partly of moveable property, and partly of immoveables of their right to be paid out of the property of the community, whether the succession has accrued to the husband, or has fallen to the wife and has been accepted by her with the consent of her husband; the whole, subject to the respective compensations. — The same rule applies if the succession have been accepted by the wife under judicial authorization only, and the moveable property belonging to it have nevertheless, been mixed up with those of the community without a previous inventory.—Lam. Arr. t. 32, a. 22, 23; Ren. Com. pt. 1, c. 12, n. 20, 24, 25; Poth. Suc. c. 5, a. 2, § 2, al. 6; 3 Mal. 200; 11 P. Fr. 354 --; 12 Toul. 426; 3 Delv. 16; C. N. 1416. [II. 411.]

1288. If the succession have been accepted by the wife under judicial authorization only, upon the refusal of the husband, an inventory have been made, the creditors can sue for their payment, only out of the property, whether moveable or immoveable, of such succession, and, if it should prove insufficient, they must for the remainder await the dissolution of the community.—Ren. Com. pt. 1, c. 12, n. 20, 24, 25; C. O. 201; Poth. Com. 261, 2, Suc. c. 5, a. 2, § 2, al. 6, C. O. t. 10. n. 10, t. 17, n. 112; Lam. t. 32, a. 24; 11 P. Fr. 354; 3 Delv. 15, 17; 12 Toul. 427-431; C. 1281; C. N. 1417. [II. 411.]

1289. The rules established by article 1282 and the articles which follow it, govern the debts attached to a gift, as well as those which attach to

a succession.—11 P. Fr. 355; 3 Delv. 17; 12 Toul. 431; C. N. 1418. [II. 411.]

1290. The creditors have a right to be paid the debts contracted by the wife, with the consent of the husband, either out of the property of the community, or out of that of the husband or of the wife; saving the compensation due to the community, or the indemnity due to the husband,—C. O. t. 10, a. 186; Poth. C. O. t. 10, n. 27, 28; Com. 248, 254; 3 Mal. 201; 11 P. Fr. 355; 3 Delv. 14, 19, 22, 23; 12 Toul. 367, 387, 415-421; C. N. 1419, 1426. [II. 411.]

1291. All debts which the wife contracts only in virtue of a general or special power of attorney from her husband, are chargeable to the community; and the creditors cannot prosecute their payment either against the wife or against her personal property.—ff. Arg. ex L. 20, Mandati; Dupl. C. P. Com. l. 1, c. 5, s. 1; 3 Mal. 202; 11 P. Fr. 356, 7; 3 Delv. 22; 12 Toul. 432; C. N. 1420. [II. 411.]

§. 2. *Of the administration of the community and of the effect of the acts of either consort, in relation to the conjugal association.*

1292. The husband alone administers the property of the community. He may sell, alienate, or hypothecate it without the concurrence of his wife.—He may even alone dispose of it, either by gifts or otherwise *inter vivos*, provided it is in favor of persons who are legally capable, and without fraud.—C. P. 225, 233; C. O. 123; Poth. Com. n. 3, p. 467, 468, 471, P. Mar. 82, C. O. t. 10, n. 58; 3 Mal. 202; Lam. t. 32, a. 65; 11 P. Fr. 355-358; Merl. Com. § 5, n. 5; C. N. 1421, 1422. [II. 411.]

1293. One consort cannot, to the prejudice of the other, bequeath more than his share in the community.—The bequest of an object belonging to the community is subject to the rules which apply to the bequest of a thing of which the testator is only part owner.—If the thing have fallen into the share of the testator and be found in his succession the legatee has a right to the whole of it.—C. P. 296; Poth. Com. 276, 475, 479, C. O. t. 10, n. 158; 3 Mal. 203; 11 P. Fr. 365; C. S. L. C. c. 34, s. 2, § 2; C. 882; C. N. 1423. [II. 411.]

1294. Pecuniary condemnations, incurred by the husband for criminal offences or misdemeanors, may be recovered out of the property of the community. Those incurred by the wife can be recovered only out of her property, and after the dissolution of the community.—L. & B. let. C. c. 35, 52; 1 J. A. l. 1, c. 28; Lepr. cent. 2, c. 98; Leb. Com. l. 2, c. 2, s. 3; Ren. Com. pt. 1, c. 6, n. 46, 51; Poth. Com. 248, 249, 257, P. mar. 56, 66, C. O. 200; 3 Mal. 202-3-4; 12 Toul. n. 221, 2; 11 P. Fr. 365; Tr. Mar. 915; C. N. 1424. [II. 413.]

1295. The criminal condemnation of one of the con-

sorts which causes civil death, affects only his share in the community and his private property.—Pap. l. 5, t. 10, n. 7; L. & B. let. C, c. 35, 52; Poth. Com. 249, 474; 11 P. Fr. 368; 12 Toul. 250 --, 223 --; C. N. 1425. [II. 413.]

1296. Acts done by the wife without the consent of her husband, even when she is judicially authorized, do not affect the property of the community beyond the amount of the benefit it derives from them, unless she contracts as a public trader, and for the purposes of her trade.—C. P. 234, 236; Poth. Com. 255-7, 500, P. Mar. 13, C. O. t. 10, n. 201; C. N. 1426. [II. 413.]

1297. [A wife cannot, without judicial authorization, obligate herself nor bind the property of the community, even for the purpose of releasing her husband from prison, or of establishing their common children, in the case of his absence.] —Poth. P. mar. n. 35-41; C. N. 1427. [II. 413.]

1298. The husband has the administration of all the private property of his wife.—He may exercise, alone, all the moveable and possessory actions which belong to his wife.—He cannot, without her consent, dispose of the immoveables which belong to her.—He is responsible for all deteriorations which his wife's private property may suffer for want of conservatory acts.—C. P. 226, 228, 233; C. O. 195; Coq. q. 107; Lam. t. 32, a. 67, 68; Poth. P. mar. 84, 91, 96, Com. 253, 473, C. O. t. 10, n. 114, 153, 157; 11 P. Fr. 371; C. N. 1428. [II. 413.]

1299. Leases of the wife's property, made by her husband alone, cannot exceed nine years; she is not bound, after the dissolution of the community, to maintain those which have been made for a longer term.—C. P. 227; Lam. t. 32, a. 69; Poth. P. mar. 92-95; C. O. t. 10, n. 156. Lou. n. 44; 2 Mal. 206; 12 P. Fr. 375 --; Merl. Com. § 3, n. 6; 2 Toul. 580-588; C. N. 1429. [II. 413.]

1300. Leases of property of the wife for nine years or for a shorter term, which have been made or renewed by the husband alone more than a year in advance of the expiration of the pending lease, do not bind the wife, unless they come into operation before the dissolution of the community. —Arr. 26 Feb. 1672; L. & B. let. B. c. 5; Poth. Lou. n. 44, P. mar. 94, C. O. t. 10, n. 156; Lam. t. 32, a. 70; 11 P. Fr. 380; 12 Toul. 588; C. N. 1430. [II. 415.]

1301. A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect.—C. S. L. C. c. 37, s. 55; 3 L. C. R. 189; C. N. 1431. [II. 415.]

1302. A husband who contracts obligations for the individual affairs of his wife, has a recourse against her property in order to obtain the reimbursement of what he is obliged to pay by reason of such obli-

gations.—3 Mal. 206; 11 P. Fr. 382; C. N. 1432. [II. 415.]

1303. If an immoveable or other object belonging exclusively to one of the consorts be sold, and the price of it be paid into the community and be not invested in replacement, or if the community receive any other thing which belongs exclusively to one of the consorts, such consort has a right to pretake such price or the value of the thing which has thus fallen into the community.—C. P. 232; Poth. Com. 497, 583, 593, 607, 608, C. O. t. 10, n. 192; C. N. 1433. [II. 415.]

1304. If, on the contrary, moneys have been withdrawn from the community and have been used to improve or to free from incumbrance an immoveable belonging to one of the consorts, or have been applied to the payment of his individual debts, or for his exclusive benefit, the other consort has a right to pretake by way of compensation, out of the property of the community, a sum equal to the moneys thus appropriated.—C. P. 232; C. O. 100; Poth. Com. 197, 585, 593, 607, 608, 594-5-7-8; 3 Mal. 207-8; 11 P. Fr. 383; C. N. 1433. [II. 415.]

1305. The replacement is perfect, as regards the husband, whenever, at the time, he declares that he makes the purchase with moneys arising from the alienation of an immoveable which belonged to himself alone, or for the purpose of replacing such immoveable. —Leb. Com. l. 3, c. 2, s. 1, dist. 2, n. 69, 70; Poth. Com. 198; 11 P. Fr. 387, 388; 11 Toul. 515; C. N. 1434. [II. 415.]

1306. The declaration of the husband, that the purchase is made with moneys arising from an immoveable sold by his wife and for the purpose of replacing it, is not sufficient, if such replacement have not been formally accepted by the wife, either by the deed of purchase itself, or by some other subsequent act made before the dissolution of the community.—Cod. L. 12, De ju. dot.; Leb. Com. l. 1, c. 5, dist. 3, n. 8, l. 3, s. 1, dist. 2, n. 72; Poth. Com. 199, 200; 3 Mal. 208; 11 P. Fr. 389 --; 3 Delv. 17; 12 Toul. 516-536; C. N. 1435. [II. 415.]

1307. The compensation for the price of an immoveable belonging to the husband can be claimed only out of the mass of the community; that for the price of an immoveable belonging to the wife, may be claimed out of the private property of the husband, if the property of the community prove insufficient.—In all cases, such compensation consists in the price brought by the sale and not in the real or conventional value of the immoveable sold.—C. P. 232; Leb. Com. l. 3, c. 2, s. 1, dist. 2; Poth. Com. 586, 588, 610, C. O. t. 10, n. 100, 101; 11 P. Fr. 393; C. N. 1436. [II. 415.]

1308. If the consorts have jointly benefited their common child, without mentioning the proportion in which they each intended to contribute, they

are deemed to have intended to contribute equally, whether such benefit has been furnished or promised out of the effects of the community, or out of the private property of one of the consorts; in the latter case, such consort has a right to be indemnified out of the property of the other, for one half of what he has so furnished, regard being had to the value which the object given had at the time of the gift.—Leb. Com. l. 3, c. 2, s. 1, dist. 6; Ren. Com. pt. 2, c. 3, n. 15; Poth. Com. 649-655, Suc. c. 4, a. 2, § 5, C. O. t. 10, n. 85, 86, 131; 11 P. Fr. 401, 402; 12 Toul. 486-497; C. N. 1438. [II. 417.]

1309. Any benefit conferred by the husband alone upon a common child is chargeable to the community, and if the wife accept the community she bears one half, unless the husband has declared expressly that he charged himself with the whole or with more than the half of such benefit.—Ren. Com. pt. 1, c. 6, n. 12, c. 13, n. 15; 2 Arg. l. 3, c. 8; Poth. Com. 647, 648, 656, 657, Suc. c. 4, a. 2, § 5, C. O. t. 10, n. 87; 3 Mal. 212; 11 P. Fr. 402; C. N. 1439. [II. 417.]

§ 3. *Of the dissolution of the community and of its continuation in certain cases.*

I. Of the dissolution of the community.

1310. The community is dissolved: 1. By natural death; 2. By civil death; 3. By separation from bed and board; 4. By separation of property; 5. By the absence of one of the consorts, in the cases and within the restrictions set forth in articles 109 and 110.—ff. L. 59, L. 63, Pro soc. § in hæred; Poc. Com. r. 40, p. 382; Poth. Com. 503-6, Mar. 522, C. O. t. 10, n. 87, 88; 3 Toul. 23, 24; C. 109, 110; C. N. 1441. [II. 417.]

1311. Separation of property can only be obtained judicially, before the court of the domicile, when the interests of the wife are imperiled and the disordered state of the husband's affairs gives reason to fear that his property will not be sufficient to satisfy what the wife has a right to receive or to get back.—All voluntary separations are null.—Cod. L. 29, L. 50, de jur. dot.; Nov. 97, c. 6; Lam. t. 32, a. 85; Poth. Com. 510-2-4-7, C. O. t. 17, n. 89; 3 Mal. 214; 11 P. Fr. 212; Merl. Séparation de biens, s. 2, § 2, n. 8; C. N. 1443. [II. 417.]

1312. Separation of property, although judicially ordered, has no effect, so long as it has not been carried into execution, either by the actual payment, established by an authentic act, of what the wife has a right to receive or to get back, or at least by proceedings instituted for the purpose of obtaining such payment.—Poth. Com. 518, 523, P. mar. 18; C. O. a. 198, *n.* 5; Lac. Séparation, n. 6, p. 639; Lam. t. 32, a. 85; 2 Pi. 195--; Merl. Séparation de biens, s. 2, § 3, a. 2, n. 6; C. N. 1444. [II. 417.]

1313. [Every judgment

ordering separation of property must be inscribed, without delay, by the prothonotary of the court which rendered the judgment, upon a list kept for that purpose and posted in his office; and such inscription and the date thereof must be mentioned at the end of such judgment, in the register in which it is recorded.—The separation affects third parties, from the day only when these formalities have been complied with.]—Special formalities are necessary in order to obtain judgments of separation of property against traders, as provided in *The Insolvent Act*, 1864.—C. O. 198; O. 1673, t. 8, a. 1, 2; Poth. Com. 517, 521; 2 Pi. 195; C. 333; 2 Mal. 215; 11 P. Fr. 415; C. N. 1445. [II. 417; III. 383.]

1314. The judgment which declares the separation of property has a retroactive effect to the day of the institution of the action.—Poth. Com. 521; Lac. 639; 11 P. Fr. 415; C. N. 1445. [II. 419.]

1315. The separation can be demanded only by the wife herself; her creditors cannot demand it, even with her consent.—Nevertheless, in the case of insolvency of the husband, they may exercise the rights of their debtor, to the extent of the amounts due them.—Lam. t. 32, a. 87; 3 Delv. 25; 11 P. Fr. 416; C. N. 1446. [II. 419.]

1316. The creditors of the husband may adopt proceedings against a separation of property which has been pronounced, or even executed in fraud of their rights; they may even intervene in the suit in which it is demanded, in order to contest it.—ff. t. t. q. in fraud. cred.; 3 Delv. 26; 3 Mal. 216; 11 P. Fr. 417; C. N. 1447. [II. 419.]

1317. The wife who has obtained a separation of property must contribute in proportion to her means and to those of her husband, to the expenses of the household as well as to those of the education of their common children. She must bear these expenses alone if nothing remain to the husband.—Cod. L. 29, de ju. dot; Poth. Com. n. 464, 522; 11 P. Fr. 419; Merl. Séparation de biens, s. 2, § 5, n. 8; C. N. 1448. [II. 419.]

1318. The wife, when separated either from bed and board or as to property only, regains the uncontrolled administration of her property. She may dispose of and alienate her moveable property. She cannot alienate her immoveables without the consent of her husband or, upon his refusal, without being judicially authorized.—Cod. L. 29, de jur. dot.; Leb. Com. l. 3, c. 2, s. 1; Bour. l. 1, pt. 4, c. 4, s. 4, a. 15, 17; Poth. Com. 464, 522; C. 177, 178, 206 --; 11 P. Fr. 420; C. N. 217, 219, 1449. [II. 419.]

1319. The husband is not responsible for the omission to invest the price of, or to replace the immoveable alienated by his wife under judicial authorization unless he has been a party to the contract, or unless the moneys are proved to have been received by him, or to

have accrued to his benefit.—He is answerable for the omission to invest or to replace, if the sale have been made in his presence and with his consent.—Leb. Com. l. 3, c. 2, s. 1, dist. 2, n. 34; 3 Mal. 218; 11 P. Fr. 421; 3 Delv. 26; C. S. L. C. c. 37, s. 51; C. N. 1450. [II. 419.]

1320. Community dissolved by separation from bed and board, or by separation of property only, may be re-established, with the consent of the parties. In the first case, the return of the wife into the house of the husband legally effects such re-establishment; in the second case, it can only be effected by an act passed before notaries as an original, a copy of which is deposited in the office of the prothonotary of the court which rendered the judgment of separation, and is joined to the record in the case; and mention of such deposit must be made in the register, at the end of such judgment, as also upon the list whereon the separation is inscribed pursuant to article 1313.—Leb. Com. l. 3, c. 1, n. 25 --; Poth. Com. 523-529, C. O. t. 10, a. 199, Mar. 554; C. 217; 3 Mal. 219; 11 P. Fr. 423; Tr. Mar. 1466; C. N. 1451. [II. 419.]

1321. In the case of the preceding article, the community so re-established resumes its effect from the day of the marriage; things are replaced in the same condition as if there had been no separation; without prejudice, however, to such acts as the wife may have done in the interval, in conformity with article 1318.—Every agreement by which the consorts re-establish their community upon conditions different from those by which it was previously governed, is void.—Leb. Com. l. 3, c. 11, n. 25; Poth. Com. 465, 523, 526-529; 11 P. Fr. 423--; C. N. 1451. [II. 419.]

1322. The dissolution of the community effected by separation, either from bed and board or as to property only, does not give rise to the rights of survivorship of the wife, unless the contrary has been expressly stipulated in the contract of marriage.—L. & B. let. C, n. 26; D, n. 36; Ren. pt. 1, c. 9, n. 23; Poth. Com. 519; C. 36, 208; C. N. 1452. [II. 421.]

II. Of the continuation of the community.

1323. If at the time of the natural or civil death of one of the consorts there be minor children issue of their marriage, and the surviving consort fail to have an inventory made of the common property, the community continues in favor of such children, if they think proper.—C. P. 240, 241; L. & B. let. C, c. 30; Poc. Com. r. 1, p. 391; Poth. Com. 769, 770, 786; Lam. t. 33, a. 1; 3 Mal. 213, 214; 11 P. Fr. 407; C. N. 1442. [II. 421.]

1324. The inventory required to prevent the continuation of the community must be authentic, it must be made in presence of a person qualified to contest, within three

months from the dissolution, and must be judicially closed within three months from its completion.—C. P. 240, 241; Poth. Com. 771 --; 2 Pr. de la Jan. 105; Lam. t. 33, a. 1, 2. [II. 421.]

1325. The continuation of the community, when it is demanded by the minor children, avails also those of the same marriage who are of age, if they choose to take advantage of it.—Ren. Com. c. 2, n. 36, 37; Lac. Com. 116; Poc. Com. a. 5; Poth. Com. 800, 813 --; Lam. t. 33, a. 22. [II. 421.]

1326. The surviving consort does not succeed to his children who die during the continuation of the community, as regards property belonging to it; the shares of such children accrue to the others who survive.—C. P. 243; 2 Lau. 235 --; Lam. t. 33, a. 30, 31. [II. 421.]

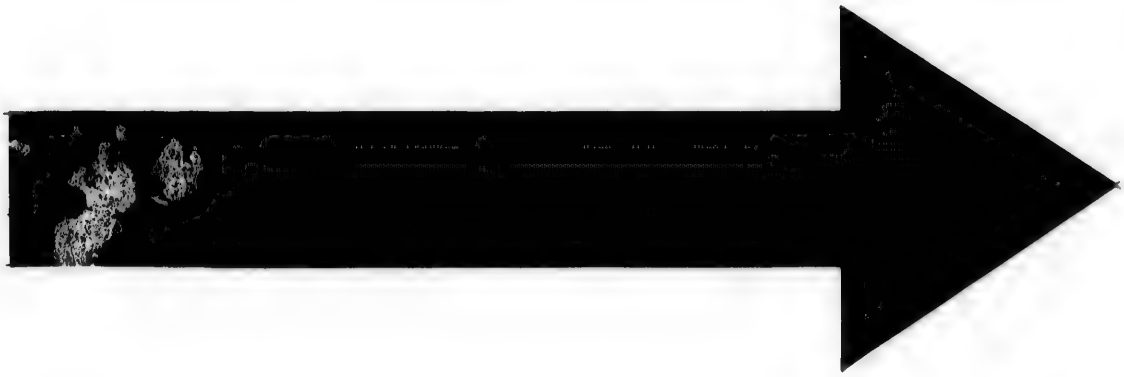
1327. The continued community is shared in halves between the survivor and his children.—If the survivor remarry, it is shared in thirds; the husband and wife having each one third, and the children of the first marriage the other third.—If each of the consorts have minor children of a previous marriage, the community continues in fourths, and is thus subdivided according to the number of marriages; the children of each marriage forming but one head. —C. P. 242; Poc. Com. a. 9; Lam. t. 33, a. 36-39; 2 Lau. 234, 5; 2 Pr. de la Jan. 109. [II. 421.]

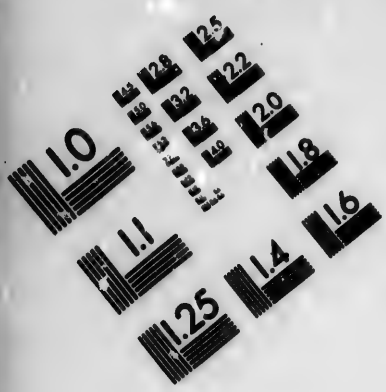
1328. The continued community cannot be divided, that is, accepted for a portion of the time that it has lasted, and rejected for the remainder; it must be accepted or rejected in its entirety.—2 Pr. de la Jan. p. 115; 2 Arg. 47; Poc. Com. r. 10; Lam. t. 33, a. 40. [II. 421.]

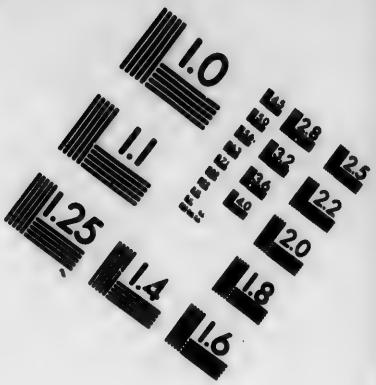
1329. All the moveable property as well as the fruits of the immoveables which formed part of the first community remain in the continuation; but the immoveables which formed part of the first community are excluded from the second, and become the private property of the survivor for one half, and of the children for the other half.—Leb. Com. l. 3, c. 3, § 2, n. 1 --; 2 Arg. 53; 2 Pr. de la Jan. 106; Lac. Com. p. 116; Ren. Com. c. 3, n. 8, 10; Poth. Com. 818 --; Lam. t. 33, a. 32, 33. [II. 423.]

1330. All property accruing to the surviving consort after the dissolution of the marriage and which would have fallen into the community, if it still existed, falls likewise into the continuation.—Leb. Com. l. 3, c. 3, s. 2, n. 10 --; 2 Pr. de la Jan. 106; Poc. r. 11.; Ren. Com. l. 3, c. 3, s. 3, dist. 1, n. 7; Poth. Com. 824 --; Lac. Com. 116, n. 9. [II. 423.]

1331. A different rule applies to the children; whatever they acquire during the continuation from other sources than the first community, by whatsoever title it may be, does not fall into the continuation, either as regards the property itself or as regards its







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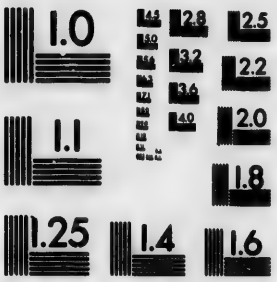

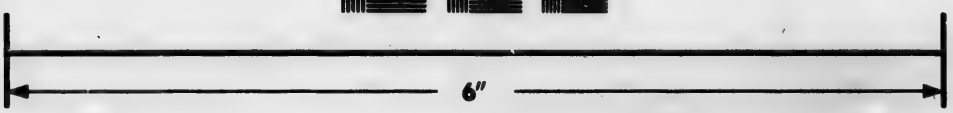

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revenues.—Leb. Com. c. 3, s. 3, dist. 1, n. 7; Pr. de la Jan. 106-7; Poc. r. 11-12, p. 397-8; Ren. Com. c. 3, n. 21, 33; Lac. 116, 117; Poth. Com. 829 --. [II. 423.]

1332. The liabilities of the continued community are:

1. The moveable debts of the first community, including the reprises and replacements due to either of the consorts, as well as the preciput of the survivor;

2. The arrears and the continuation of rents due by the first community;

3. The debts contracted by the survivor for the affairs of the continuation, but not those unconnected with it. — Leb. Com. l. 3, c. 3, s. 4; Ren. pt. 4, c. 1; Pr. de la Jan. 107, 108; Poc. r. 13, p. 399; Lac. 117; Poth. Com. 837 --. [II. 423.]

1333. The survivor is the head and the administrator of the continued community, and as such may dispose of all that belongs to it, provided it be otherwise than by gratuitous title and without fraud.—C. P. 225; 2 Pr. de la Jan. 109, 111; 2 Arg. 56; Poc. r. 13, p. 399; Lac. Com. n. 12, p. 117; Poth. Com. 859; Lam. t. 33, a. 4. [II. 423.]

1334. The survivor and the children take their food and maintenance out of the continuation of the community, without compensation being due from either side, although their expenses be not equal.—Poc. 400; Ren. Com. pt. 3, c. 3, 6; Bac. D. J. c. 15, n. 26. [II. 423.]

1335. The continuation of the community is dissolved by the natural or civil death of the survivor, or in consequence of all the children dying without issue.—It may also be dissolved at any time upon the demand of either of the parties, although some of the children should still be under age.—C. P. 242; 2 Arg. 52-4; Leb. Com. c. 3, s. 3, n. 1; Ren. pt. 2, n. 18; 2 Pr. de la Jan. 112-3; Lac. 118, n. 17; Poth. Com. 854 --. [II. 423.]

1336. If the dissolution be demanded by the survivor and some of the children be still minors, his demand must be preceded by an inventory which he must make according to the form of that required to prevent the continuation; and for such purpose, a tutor *ad hoc* is named in order to represent the minors and to stand as an adverse party.—2 Pr. de la Jan. 113; Poth. Com. 854 --. [II. 423.]

1337. If such dissolution be demanded by the children, they may compel the survivor, either in their own name if they be all of full age, or in the name of their tutor, for such as are minors, to make an inventory and to render them an account.—C. P. 242; 2 Pr. de la Jan. 113; Poth. Com. 854, 855 --. [II. 425.]

§. 4. *Of the acceptance of the community and of the renunciation that may be made thereof, with the conditions relative thereto.*

1338. After the dissolution of the community, the wife or

her heirs or legal representatives, have a right either to accept or renounce it; any agreement to the contrary is void.—C. P. 257; Bour. l. 3, pt. 4, c. 5, s. 1, n. 2; C. O. 204; Poth. Com. Intr. n. 9, Com. 243, 531, 535, 547, 549, 550, 551; 3 Mal. 220; 11 P. Fr. 425; C. N. 1453. [II. 425.]

1339. A wife who has intermeddled with the property, cannot renounce the community.—Acts of mere administration or of a conservatory nature do not constitute intermeddling.—Cod. L. 1, De rep. vel. abst. hered., L. 2, De ju. del.; C. P. 237; C. O. 204; Poth. Com. 538, 539, 540, C. O. t. 10, n. 91; Ren. Com. pt. 2. c. 1, n. 9; C. N. 1454. [II. 425.]

1340. A wife of full age who has once assumed the quality of common as to property, can no longer renounce it, nor be relieved from such quality, unless there has been fraud on the part of the heirs of the husband.—Bour. l. 3, pt. 4, c. 5, dist. 3, n. 93; Coq. q 115; 3 Mal. 221; 11 P. Fr. 426; Poth. Com. 532, 536, 558, C. O. t. 10, n. 93; Merl. Renonciation à Com. n. 6; C. N. 1455. [II. 425.]

1341. [If the wife be under age, she cannot accept the community without the assistance of her curator, and the authorization of a judge, upon the advice of a family council; when made with these formalities, the acceptance is irrevocable, and has the same effect as if the wife had been of age.—Coq. q. 115; Poth. Com. 532, 558, C. O. t. 10 n. 93; C. 182, 301, 1001 --. [II. 425.]

1342. The wife surviving her husband must, within three months from his death, cause a faithful and correct inventory of all the property of the community to be made in the presence of the heirs of the husband, or after having duly summoned them.—[This inventory must be made in notarial form, as an original, and be judicially closed in the manner required by article 1324 in order to prevent the continuation of the community.]—C. P. 237; Bour. l. 3, pt. 4, c. 5, dist. 2, n. 28; Poc. Com. r. 48, p. 337; Poth. Com. 560, 561, 563-566, 681-7, C. O. a. 204, n. 6, 7; O. 1667, t. 7, a. 5; Merl. Inventaire, § 5, n. 3; C. N. 1456. [II. 425.]

1343. The wife may however renounce the community, without making an inventory, in the following cases: when the dissolution takes place during the lifetime of the husband; when the heirs of the latter are in possession of all the property; when an inventory has been made at their instance, or one has been made shortly before the death of the husband; when a general seizure and sale of the property of the community have been recently made, or when it has been established by an official return that none existed.—Poth. Com. 561, 563, 564, 565, C. O. 204, n. 6, 7. [II. 427.]

1344. Besides the three months allowed the wife to make the inventory, she has, in order to deliberate upon her

acceptance or repudiation, a delay of forty days, which commence to run from the expiration of the three months, or from the closing of the inventory, if it have been completed within the three months.—O. 1667, t. 7, a. 1, 2; Poth. Com. 552-3, C. O. t. 10, n. 92; C. 664; C. N. 795, 1457. [II. 427.]

1345. Within these delays of three months and forty days, the wife must make her renunciation, by means of an act in notarial form, or of a judicial declaration, which the court orders to be recorded.—Poth. Com. 552, 553, C. O. t. 10, n. 92; C. 651; C. N. 1457. [II. 427.]

1346. The wife who is sued as being in community, may nevertheless, according to circumstances, obtain from the court an extension of the delays established by the foregoing articles.—O. 1667, t. 7, a. 4, 5; C. 667; C. N. 1458. [II. 427.]

1347. The wife who has neither made an inventory nor renounced within the delays above prescribed or granted, is not therefor precluded from doing so; she is on the contrary, allowed to do so, so long as she has not intermeddled or has not acted as being in community; but she can be sued as being in community so long as she has not renounced, and she is liable for the costs incurred against her up to the time of such renunciation.—Poth. Com. 534, 544, 556, 557, C. O. t. 10, n. 93; Ren. Com. pt. 2, c. 1, n. 28; 3 Mal. 222; C. 656; C. N. 1459. [II. 427.]

1348. The widow who has abstracted or concealed any of the effects of the community is declared to be in community, notwithstanding her renunciation; the same rule applies to her heirs.—Leb. Com. l. 3, c. 2, dist. 2; Poc. 389; Ren. Com. pt. 2, c. 2; Poth. Com. 690; C. O. a. 204; 11 P. Fr. 429; C. N. 1460. [II. 427.]

1349. If the widow die before the expiration of the three months, without having made or completed the inventory, her heirs have, in order to make and complete it, a further delay of three months, reckoning from her death, and of forty days after the closing of the inventory, in order to deliberate.—If the widow die after completing the inventory, her heirs have, in order to deliberate, a fresh delay of forty days from her death.—They may moreover in all cases renounce the community, according to the forms established with regard to the wife, and articles 1346 and 1347 are applicable to them.—3 Delv. 30; Fav. Reg. dot. § 2, n. 10; 5 Mar. 601; C. N. 1461. [II. 427.]

1350. The provisions of article 1342 and of those which follow it apply to the wives of individuals who are civilly dead, commencing from the moment at which civil death took place.—C. 36, § 7, 8; 11 P. Fr. 430; C. N. 1462. [II. 429.]

1351. The creditors of the wife may impugn the renunciation which she or her heirs may

have made in fraud of their claims and may accept the community in their own right. —In such case, the renunciation is annulled only in favor of the creditors and to the extent of the amount of their claims. It is not annulled in favor of the wife or of her heirs who have renounced.—ff. arg. ex tit.: Quæ in fraud. cred.; Poth. Com. 533, 559; C. 655, 1031; 11 P. Fr. 432; C. N. 1464. [II. 429.]

1352. The widow, whether she accepts or renounces, has a right, during the delays which are prescribed or allowed her in order to make the inventory and to deliberate, to sustain herself and her domestics, upon the provisions then existing, and in default of these by means of loans obtained on account of the community, subject to the condition of making a moderate use thereof.—She owes no rent for her occupation, during these delays, of the house in which she remains after the death of her husband, whether such house belongs to the community or to the heirs of the husband, or is held under lease; in the last case the wife does not contribute to the payment of the rent during these delays but it is taken out of the mass. —Poth. Com. 542, 770, 771; 3 Mal. 224, 5; 11 P. Fr. 433; 3 Delv. 31; 5 Proud. Usufruit, n. 2799; C. N. 1465. [II. 429.]

1353. When the community is dissolved by the previous death of the wife, her heirs may renounce it within the delays and according to the forms prescribed by law with regard to the surviving wife, saving that they are not obliged for that purpose to make an inventory.—Poth. Com. 559, 562, ; 11 P. Fr. 433, 4; C. N. 1466. [II. 429.]

§ 5. *Of the partition of the community.*

1354. After the acceptance of the community by the wife or her heirs, the assets are divided and the liabilities borne in the manner hereinafter determined.—Poth. Com. 548, 582; C. O. a. 186; C. N. 1467. [II. 429.]

I. Of the partition of the assets.

1355. The consorts or their heirs return into the mass of the community all that they owe it by way of compensation or indemnity, according to the rules above prescribed in the second paragraph of this section. — Poth. Com. 582, 583, 612; 3 Mal. 225; 11 P. Fr. 435; C. N. 1468. [II. 429.]

1356. Each consort or his heirs return likewise the sums drawn from the community, or the value of the property taken therefrom by such consort, in order to endow a child of another marriage, or to endow personally their common child. Ren. Com. pt. 2, c. 3, n. 16; Poth. Com. 641, C. O. t. 10, n. 130, 1; C. N. 1469. [II. 429.]

1357. Out of the mass of the community each consort or his heirs pretake:

1. Such of his private property as did not enter into the community, if it exist in kind,

or such property as has been acquired in replacement of it;

2. The price of such of his immoveables as have been alienated during the community and have not been replaced;

3. The indemnities due him by the community.—C. P. 232; C. O. 192; L. & B. let. R. c. 30; Leb. Com. l. 3, c. 2, s. 6; Poth. Com. 9, 100, 112, 116, 584, 607, 609, 701, C. O. t. 10, n. 99, 112; C. N. 1470. [II. 429.]

1358. The pretakings of the wife take precedence of those of the husband. They are effected, as regards such property as no longer exists in kind, first upon the ready money, next upon the moveable property, and subsidiarily upon the immoveables of the community; in the last case, the choice of the immoveables is left to the wife and to her heirs.—Poth. Com. 701, C. O. n. 98, 117; 3 Mal. 226; 11 P. Fr. 437; 12 Toul. 513; C. N. 1471. [II. 431.]

1359. The husband takes his reprises only upon the property of the community.—The wife and her heirs, in case the community proves insufficient, may exercise theirs upon the private property of the husband.—Poth. Com, 610, C. O. t. 10, n. 117; 11 P. Fr. 437; 3 Delv. 36; C. N. 1472. [II. 431.]

1360. The replacements and compensations due by the community to the consorts, and the compensations and indemnities due by them to the community, bear interest, by law, from the day of its dissolution.—Poth. Com. 589, 702, C. O. t. 10, n. 134; 3 Mal. 227; 11 P. Fr. 438; C. N. 1473. [II. 431.]

1361. After the pretakings have been effected and the debts have been paid out of the mass, the remainder is divided equally between the consorts or their representatives.—Poth. Com. 530, 577, 701, 702; 11 P. Fr. 438; 3 Delv. 36; C. N. 1474. [II. 431.]

1362. If the heirs of the wife be divided, so that some have accepted and others have renounced the community, those who have accepted cannot take out of the property falling to the wife's share any more than they would have received if all had accepted.—The residue remains with the husband, who is liable toward the heirs who have renounced for such rights as the wife might have exercised in case of renunciation, but only to the extent of the hereditary share of each heir who has thus renounced.—Poth. Com. 578, 579, C. O. t. 10, n. 95; 11 P. Fr. 439; C. N. 1475. [II. 431.]

1363. The partition of the community, in all that regards its forms, the licitation of immoveables when there is occasion for it, the effects of the partition, the warranty which results from it, and the payment of differences, is subject to all the rules established in the title *Of Successions* for the partition among coheirs.—C. 689 --; 3 Delv. 36; C. N. 1476. [II. 431.]

1364. The consort who has abstracted or concealed effects belonging to the community, forfeits his share of such effects.

Leb. Com. l. 3, c. 2, s. 2, n. 31; L. & B. let. R. n. 1; Poth. Com. 690, 691; 3 Mal. 227, 228; 11 P. Fr. 440, 441; C. N. 1477. [II. 431.]

1365. After the partition has been effected, if one of the consorts be the personal creditor of the other, as when the price of a property of the former has been applied to the payment of a personal debt of the other, or for any other cause, he may prosecute his claim out of the share of the community allotted to his debtor or out of the personal property of such debtor. — Poth. Com. 676, 680; 11 P. Fr. 441; C. N. 1478. [II. 431.]

1366. The personal claims which the consorts may have to enforce against each other bear interest only according to the ordinary rules.—ff. Arg. ex L. 17, § 3, de us., L. 127, de verb. ob.; Merl. Gains nuptiaux, § 5, n. 3; 11 P. Fr. 441, 442; C. N. 1479. [II. 433.]

1367. Gifts made by one consort to the other are not taken out of the community, but only from the share of the donor therein, or from his private property.—Poth. Com. 679; 11 P. Fr. 442; 3 Delv. 38; C. N. 1480. [II. 433.]

1368. The mourning of the wife is chargeable to the heirs of her deceased husband.—The cost of such mourning is to be regulated according to the fortune of the husband.—It is due even to the wife who renounces the community.—Cod. L. 22, § 9, de jur. delib.; L. 13, de neg. gest.; Ren. Com. pt. 2, c. 3, n. 28; Poth. Com. 275, 678; 11 P. Fr. 243; 3 Delv. 31; C. N. 1481. [II. 433.]

II. Of the liabilities of the community and of the contribution to the debts.

1369. The debts of the community are chargeable one half to each of the consorts or his heirs.—The expenses of seals, inventories, sales of moveable property, liquidation, licitation and partition, are included in such debts.—Poth. Com. 274, 275, 498, 548, 576, 726, 733; Bour. l. 3, pt. 6, c. 6, s. 4, a. 19; Poth. C. O. t. 10, n. 135; C. N. 1482. [II. 433.]

1370. The wife even though she accepts the community, is not liable for its debts, either toward her husband or toward creditors, beyond the amount of the benefit she derives from it; provided she has made a good and faithful inventory and has rendered an account both of what is contained in such inventory and of what has fallen to her in the partition.—C. P. 221, 228; Ren. Com. pt. 2, c. 6, n. 5; Poth. Com. 727, 729, 759, 703, 726, 733, 735 --, 740, 745, Ob. 84, C. O. t. 10, n. 187; 3 Mal. 230; 11 P. Fr. 445; C. N. 1483. [II. 433.]

1371. The husband is liable toward the creditors for the whole of the debts of the community which were contracted by himself; saving his recourse against his wife or her heirs, if they accept, for the half of such debts, or for an amount equivalent to the benefit which they have derived

from the community.—Leb. Com. l. 2, c. 3; Ren. Com. pt. 2, 6, n. 5; Poth. Com. 727, 729, 759; C. O. t. 10, n. 135, 136; 3 Mal. 230; 11 P. Fr. 455; C. N. 1484. [II. 433.]

1372. He is liable only for half of such personal debts of his wife as were chargeable to the community, unless the share coming to the wife proves insufficient to pay her half.—Leb. Com. l. 2, c. 3, s. 1, n. 18; Poth. Com. 730, C. O. t. 10, n. 137, 138; 3 Mal. 230 231; 11 P. Fr. 455 --; C. N. 1485. [II. 433.]

1373. The wife may be sued for the whole of the debts which are attributable to herself and have fallen into the community; saving her recourse against the husband or his heirs, for half of such debts, if she accept, and for the whole, if she renounce.—Ren. Com. pt. 2, c. 6, n. 12, 13; Poth. Com. 731, 739, 759, C. O. t. 10, n. 138; 11 P. Fr. 456; C. N. 1486. [II. 433.]

1374. The wife who, during the community, binds herself for or together with her husband, even jointly and severally, is held to have done so only in her quality of common as to property; if she accept she is personally bound for her half only of the debt thus contracted, and she is not at all liable if she renounce.—C. S. L. C. c. 37, s. 55; C. N. 1487. [II. 433.]

1375. The wife who has paid more than her half of a debt of the community, cannot get back what she has overpaid, unless the receipt expresses that what she paid was for her half.—But she retains her recourse against her husband or his heirs.—ff. L. 19, L. 44, L. 65, de cond. indeb.; Poth. Com. 736, 738, C. O. t. 10, a. 187, n. 4; 3 Mal. 231; 11 P. Fr. 457; 3 Delv. 37; C. N. 1488. [II. 435.]

1376. The consort who, by reason of the enforcing of a hypothec upon the immoveable which has fallen to his share, is sued for the whole of a debt of the community, has his legal recourse for one half of such debt against the other consort or his heirs.—Poth. Com. 751, 759, C. O. t. 10, n. 104, 140; 11 P. Fr. 457, 458; C. N. 1489. [II. 435.]

1377. Notwithstanding the foregoing provisions, either of the copartitioners may, by the partition, be charged with the payment of a proportion of the debts, other than half, or even with the payment of the whole.—Poth. Com. 759, C. O. t. 10, n. 140; 11 P. Fr. 458, 459; C. N. 1490. [II. 435.]

1378. All that has been declared above in respect of the husband or of the wife applies to the heirs of either, and such heirs exercise the same rights and are subject to the same actions as the consort whom they represent.—ff. L. 24, De verb. sig., L. 119, De adq. v. om. hered.; Poth. Com. 730, 733, 737, 741, 744, 750; C. N. 1491. [II. 435.]

§ 6. *Of renunciation of the community and of its effects.*

1379. The wife who renounces, cannot claim any

share in the property of the community, not even in the moveable property she herself brought into it.—C. N. 1492. [II. 435.]

1380. [She may, however, retain the wearing apparel and linen in use for her own person, exclusive of all other jewelry than her wedding presents.]—Poth. Com. 549, 568, 569, 572; 3 Mal. 232; 11 P. Fr. 460; 3 Delv. 39; Merl. Accroissement; C. N. 1492. [II. 435.]

1381. The wife who renounces has a right to take back:

1. The immoveables belonging to her, if they exist in kind, or those which have been acquired to replace them;

2. The price of her immoveables which have been alienated, and the replacement of which has not been made and accepted as mentioned above in article 1306;

3. The indemnities which may be due to her from the community.—C. P. 232; C. O. 192; Leb. Com. l. 3, c. 2, s. 6, dist. 1, n. 1; Poth. Com. 99, 100, 585, 595, 602-609, C. O. t. 10, n. 99, 100, 112, 116; 11 P. Fr. 461; C. N. 1493. [II. 435.]

1382. The wife who renounces is freed from all contribution to the debts of the community, both as regards her husband and as regards creditors, even those towards whom she bound herself jointly and severally with her husband. — She remains liable however for debts which are attributable to herself and have fallen into the community, saving in such case, her recourse against her husband or his heirs.—Ren. Com. pt. 2, c. 6, n. 15; Poth. Com. 573-575, 731, 732, C. O. t. 10, n. 14; C. O. 205; C. S. L. C. c. 37, s. 55; 3 Mal. 233; 11 P. Fr. 462; C. N. 1494. [II. 435.]

1383. She may exercise all the rights and reprises hereinabove enumerated, as well against the property of the community as against the private property of her husband.—Her heirs may do the same, except as regards the pretaking of linen and wearing apparel, and as regards lodging and maintenance during the delays allowed for the inventory and for deliberating; which rights are purely personal to the surviving wife.—Poth. Com. 572, 583, 680; 11 P. Fr. 463; 3 Delv. 21, 40; C. N. 1495. [II. 437.]

SECTION II.

Of conventional community and of the most ordinary conditions which may modify or even exclude legal community.

1384. The consorts may modify the legal community by all kinds of agreements, not contrary to articles 1258 and 1259.—The principal modifications are those which result from stipulating:

1. By way of realization, that the moveable property either present or future, shall not enter into the community or shall only enter for part;

2. By way of mobilization, that the whole or a portion of

the immoveables present or future shall be included in it;

3. That the consorts shall be separately liable for their debts contracted before marriage;

4. That in case of renunciation, the wife may take back from the community, free and clear from all claims, whatever she brought into it;

5. That the survivor shall have a preciput;

6. That the consorts shall have unequal shares;

7. That universal community, or a community by general title, shall exist between them.—Poth. Com. 272, 466; 12 P. Fr. 5 --; 2 Rog. 1819; C. N. 1497. [II. 437.]

§ 1. *Of the clause of realization.*

1385. By the clause of realisation the parties exclude from the community, either wholly or in part, the moveable property which would otherwise fall into it.—When they stipulate that they will reciprocally put into the community moveable property to the extent of a certain sum or of a determinate value, they are, by such stipulation alone, presumed to have reserved the remainder. — Poth. Com. 287, 301, 315-318, 331; 11 P. Fr. 15 --; 2 Rog. 1829; C. N. 1500. [II. 437.]

1386. This clause renders the consort debtor to the community for the amount which he promised to contribute, and obliges him to substantiate such contribution.—Poth. Com. 287-290, 296, 302, C. O. t. 10, n. 40, 45; 3 Mal 238 --; 11 P. Fr. 26 --; 2 Rog. 1830; C. N. 1501. [II. 437.]

1387. The contribution is sufficiently substantiated, as regards the husband, by the declaration made in the contract of marriage that his moveable property is of a certain value.—It is sufficiently substantiated, as regards the wife, by the discharge which the husband gives either to her or to those who made the endowment.—If such contribution be not claimed within ten years the wife is presumed to have made it; saving the right of proving the contrary.—Poth. Com. 297, 298, 300, C. O. t. 10, n. 45; Leb. Com. l. 3, t. 2, s. 1, dist. 3, n. 42; 1 Bour. 650; 3 Mal. 239, 240; 11 P. Fr. 33 --; 2 Rog. 1830; C. N. 1502. [II. 437.]

1388. After the dissolution, each consort has a right to take back, before partition, out of the property of the community, the value of the moveable property which he brought into it at the marriage or which accrued to him after it, over and above what he bound himself to bring into the community.—Poth. Com. 319, 325; 3 Mal. 239, 240; 12 P. Fr. 36; 3 Delv. 43; 2 Rog. 1830; C. N. 1503. [II. 439.]

1389. [In the case of the preceding article, the moveable property which accrues to either consort during marriage must be established by an inventory or some other equivalent title.—As regards the husband, in default of such inventory or title, he forfeits his right to take back the

moveable property which has fallen to him during the marriage.—As regards the wife, on the contrary, she or her heirs are, in such case, admitted to make proof either by titles or by witnesses, or even by common rumor, of the moveable property, thus accrued to her.]—Poth. Com. 300; 3 Mal. 240; 12 P. Fr. 39, 40; 2 Rog. 1832; C. N. 1504. [II. 439.]

§ 2. *Of the clause of mobilization.*

1390. The clause of mobilization is that by which the consorts, or either of them, bring into the community the whole or a portion of their immoveables, whether present or future.—Ren. Propres, c. 6, s. 1, 3, 8; Poth. Com. 303, C. O. t. 10, n. 53, 56; C. N. 1505. [II. 439.]

1391. Mobilization is either general or special.—It is general when the consorts declare their intention of being in community as to all their property, or that all successions falling to them shall belong to the community.—It is particular when they have only undertaken to bring into the community some determinate immoveables.—Poth. Com. 304, 305, C. O. t. 10, n. 52, 53. [II. 439.]

1392. Mobilization may be either determinate or indeterminate.—It is determinate, when the consort declares that he brings as moveable into the community, a certain immoveable, either wholly or to the extent of a certain sum. It is indeterminate when the consort simply declares that he brings into the community his immoveables to the extent of a certain sum.—Poth. Com. 305, C. O. t. 10, n. 53, 55; Leb. Com. l. 1, c. 5, dist. 2, n. 7; C. N. 1506. [II. 439.]

1393. The effect of determinate mobilization is to convert the immoveable or immoveables affected by it into community property, as moveables themselves would be.—When the immoveable or immoveables of the wife are contributed as moveable in whole, the husband may dispose of them as of the other effects of the community and alienate them entirely.—If the immoveable be contributed as moveable only to the extent of a certain sum, the husband cannot alienate it without the consent of his wife; he may however hypothecate it without such consent, but only to the extent of the portion so contributed.—Leb. Com. l. 1, c. 5, dist. 7; Poth. Com. 307, 309, 311, C. O. t. 10, n. 53, 55; 11 P. Fr. 44, 5; C. N. 1507. [II. 439.]

1394. Indeterminate mobilization does not confer upon the community the ownership of the immoveables affected by it, its effect is merely to oblige the consort who has undertaken it to include in the mass, at the time of the dissolution, some of his immoveables to the extent of the sum which he has promised.—The husband, without the consent of his wife, cannot alienate, in whole or in part, the immoveables subjected to indeterminate mo-

bilization, but he may hypothecate them to the extent of such mobilization.—Poth. Com. 313, C. O. t. 10, n. 55; 3 Mal. 242, 3; 11 P. Fr. 49; 3 Delv. 45; 2 Rog. 1834 --; C. N. 1508. [II. 441.]

1395. The consort who has contributed an immoveable as moveable, has a right, when the partition takes place, to retain it, on account of his share, at the price it is then worth, and his heirs have the same right.—Poth. Com. 310, 712; 12 P. Fr. 52; 3 Mal. 243; 5 Proud. Usuf. n. 2664; C. N. 1509. [II. 441.]

§ 3 *Of the clause of separation of debts.*

1396. The clause by which the consorts stipulate that they will separately pay their personal debts, obliges them to account to each other respectively, at the time of the dissolution of the community, for such debts as are established to have been paid by the community in discharge of the consort who was liable for them.—This obligation is the same, whether an inventory has been made or not; but if the moveable property brought in by the consorts have not been determined by an inventory or an authentic statement anterior to the marriage, the creditors of either consort without regard to any distinctions that may be claimed, have a right to be paid out of such property, as well as out of all the other property of the community.—The creditors have the same right with regard to such moveable property as may have fallen to the consorts during the community, if likewise it have not been determined by an inventory or authentic statement.—C. P. 222; C. O. 212; Leb. Com. l. 2, c. 3, s. 4; Ren. Com. pt. 1, c. 11; Poth. Com. 351, 353, 361, 363, 370, 371, 615, C. O. a. 212; 3 Mal. 244; 12 P. Fr. 53 --; 3 Delv. 46; C. N. 1510. [II. 441.]

1397. When either of the consorts brings into the community a certain sum or a determinate object, such a contribution implies a tacit agreement that it is not encumbered with debts anterior to the marriage, and he must account to the other for all such incumbrances as lessen its value.—Poth. Com. 352, C. O. t. 10, n. 65; 3 Mal. 246; 12 P. Fr. 61; 3 Delv. 45; C. N. 1511. [II. 441.]

1398. The clause of separation of debts does not prevent interest and arrears which have accrued since the marriage from being chargeable to the community.—Leb. Com. l. 2, c. 3, s. 4, n. 10; Poth. Com. 360, 375; 3 Mal. 246, 247; 12 P. Fr. 62; C. N. 1512. [II. 441.]

1399. When the community is sued for the debts of one of the consorts, who is declared by the contract to be free and clear from all debts anterior to the marriage, the other consort has a right to an indemnity, to be taken from the share in the community which belongs to the indebted consort, or from his private property;

and in case of insufficiency, such indemnity may be prosecuted, by way of warranty, against the parties who made the declaration that such consort was free and clear.—This right of warranty may even be exercised by the husband during the community, if the debt have originated with the wife; saving, in such case, the right of the warrantor to be reimbursed by the wife or her heirs, after the dissolution of the community.—Leb. Com. l. 2, c. 3, s. 3, n. 41, 42; Ren. Com. pt. 1, c. 2, n. 36; Poth. Com. 365-378, C. O. t. 10, n. 84-6; Lac. Com. pt. 2, s. 7; 3 Mal. 247; 12 P. Fr. 64-72; C. N. 1513. [II. 441.]

§ 4. *Of the right given to the wife of taking back free and clear what she brought into the community.*

1400. The wife may stipulate, that in case of renunciation of the community, she shall take back the whole or a part of what she brought into it either before or since the marriage; but such stipulation cannot extend beyond things formally specified, nor to other persons than those who are designated.—Thus, the right of taking back the moveable property brought in by the wife at the time of the marriage, does not extend to similar property accrued to her during the marriage.—Thus, the right given to the wife does not extend to the children; and that given to the wife and to the children, does not extend to her ascendant or collateral heirs.—In all cases, the wife can only take back her contributions after deduction has been made of such of her private debts as have been paid out of the community.—Poth. Ob. 63, Com. 379-391, 393-395, 399, 401, 2, 407-411, C. O. t. 10, n. 68, 70, 71, 75; 3 Mal. 250; 12 P. Fr. 73--; Merl. Renonciation à la com. n. 14; C. N. 1514. [II. 443.]

§ 5. *Of conventional preciput.*

1401. The clause by which the surviving consort is authorized to pretake, before any partition, a certain sum or a certain quantity of moveable effects in kind, does not take effect in favor of the surviving wife who does not accept the community; unless by the contract of marriage such right is reserved to her, even when she renounces.—Excepting the case of such reservation, preciput can only be taken from the mass to be divided, and not from the private property of the predeceased consort.—Poth. Com. 413, 440-442, 447, 448, 568, C. O. t. 10, n. 77, 79; 3 Mal. 251-2; 12 P. Fr. 94; 3 Delv. 48, 49; 2 Rog. 1839; D. 356, n. (a); C. N. 1515. [II. 3.]

1402. Preciput is not regarded as a benefit subject to the formalities of gifts, but as a marriage covenant.—Del. 25 June, 1727; O. 1731, a. 21; Poth. Com. 442; 12 P. Fr. 105; 2 Rog. 1840; C. N. 1516. [II. 443.]

1403. Natural death opens

the right to preciput by the sole operation of law.—It does not open by civil death, unless this effect result from the terms of the contract of marriage; and if there be no stipulation concerning it, it remains suspended in the hands of the representatives of the person civilly dead.—Poth. Com. 443; C. O. t. 10, n. 78; C. 36, § 8; 3 Mal. 252; 12 P. Fr. 106 --; 3 Delv. 48; C. N. 1517. [II. 443.]

1404. When the community is dissolved during the lifetime of the consorts in consequence of separation from bed and board or of separation of property only, such dissolution does not, unless the contrary be stipulated, open the right to preciput in favor of either of the consorts. The right remains suspended until the death of the consort who dies first.—In the interval, the sum or the thing which constitutes the preciput remains provisionally with the husband, from whose succession the wife may claim it, if she have survived him. — Poth. Com. 445, 510; 12 P. Fr. 108 --; 3 Delv. 48; Merl. Préciput conventionnel, § 1, n. 1; 2 Rog. 1841; C. N. 1518. [II. 443.]

1405. The creditors of the community have always a right to cause the effects comprised in the preciput to be sold; saving the recourse of the consort, conformably to article 1401.—3 Mal. 252, 3; 12 P. Fr. 113; 3 Delv. 49; C. N. 1519. [II. 445.]

§ 6. *Of the clauses by which unequal shares in the community are assigned to the consorts.*

1406. The consorts may depart from the equal division established by law, either by giving to the surviving consort or his heirs, only a share in the community less than half, or by giving him only a fixed sum in lieu of all rights in the community, or by stipulating that the entire community, in certain cases, shall belong to the surviving consort, or to one of the consorts solely. — Poth. Com. 449, 450, 460, C. O. t. 10, n. 80; 3 Mal. 253; 12 P. Fr. 114, 115; 3 Delv. 49; 2 Rog. 1843; C. N. 1520. [II. 445.]

1407. When it is stipulated that the consort or his heirs shall have only a certain share in the community, as a third, a fourth, the consort whose share is so reduced or his heirs bear the debts of the community only in proportion to the share they take in the assets. — The agreement is void if it oblige such consort or his heirs, to bear a greater share, or if it exempt them from bearing a share of the debts equal to that which they take in the assets. — Poth. Com. 449; 3 Mal. 254; 12 P. Fr. 116 --; 3 Delv. 50; C. N. 1521. [II. 445.]

1408. When it is stipulated that one of the consorts or his heirs shall be entitled only to a certain sum in lieu of all rights of community, the clause is a definitive agreement which obliges the other

consort or his heirs to pay the sum agreed upon, whether the community be good or bad, or sufficient or not to pay such sum.—ff. arg. ex L. 10, de reg. ju.; L. & B. let. M, c. 4; Darg. C. Br. a. 22, gl. 4; Poth. Com. 450-452, C. O. t. 10, n. 80; Merl. Communauté, § 4, n. 7; Bour. Com. 513; 3 Mal. 254; 2 Rog. 1844; C. N. 1522. [II. 445.]

1409. If the clause establishes this definitive agreement with regard to the heirs only of one of the consorts, such consort, if he survive, has a right to the legal partition by halves. — Poth. Com. 453; 3 Mal. 254; 3 Delv. 50; 12 P. Fr. 119--; 2 Rog. 1844; C. N. 1523. [II. 445.]

1410. The husband or his heirs who, in virtue of the clause mentioned in article 1406, retain the whole of the community, are obliged to pay all its debts. The creditors in such case have no action against the wife or against her heirs.—If it be the wife surviving who, in consideration of a stipulated sum, has the right of retaining the whole of the community against the heirs of the husband, she has the option of either paying such sum and remaining liable for all the debts, or of renouncing the community and abandoning to the heirs of the husband both the property and the debts. —Poth. Com. 55, 57, 58, 60, C. O. t. 10, n. 82; 3 Delv. 50; 3 Mal. 255; 12 P. Fr. 119-127; 2 Rog. 1844; C. N. 1524. [II. 445.]

1411. When the consorts stipulate that the whole of the community shall belong to the survivor, or to one of them only, the heirs of the other have a right to take back what had been brought into the community by the person they represent.—Such a stipulation is but a simple marriage covenant, and is not subject to the rules and formalities applicable to gifts.—3 Mal. 256; 12 P. Fr. 128-131; 2 Rog. 1845-1847; C. N. 1525. [II. 445.]

§ 7. *Of community by general title.*

1412. The consorts may establish by their contract of marriage a general community of their property both moveable and immoveable, present and future, or of all their present property only, or of their future property only.—ff. L. 3, L. 7, pro socio.; 3 Mal. 256; 12 P. Fr. 132-139; 2 Rog. 1843; C. N. 1526. [II. 447.]

Provisions common to the articles of this section.

1413. The above articles do not confine to their precise provisions the stipulations of which conventional community is susceptible.—The consorts may make any other covenants, as mentioned in articles 1257 and 1384.—12 P. Fr. 140, 141; Merl. Noces (Secondes), § 7, a. 2, n. 4; C. N. 1527. [II. 447.]

1414. Conventional community remains subject to the rules of legal community in all cases where they have not been implicitly or explicitly departed from by the contract. —5 Toul. 817; 12 P. Fr. 141;

3 Delv. 9, 40; C. N. 1528. [II. 447.]

§ 8. *Of covenants excluding community.*

1415. When the consorts stipulate that there shall be no community, or that they shall be separate as to property the effects of such stipulations are as follows. — Poth. Com. 461, 464, C. O. t. 10, n. 83; 3 Mal. 258; 12 P. Fr. 142, 3; 3 Delv. 51; C. N. 1529. [II. 447.]

I. Of the clause simply excluding community.

1416. The clause which declares that the consorts marry without community does not give the wife the right to administer her property, nor to receive the fruits thereof; these are deemed to be contributed by her to her husband to enable him to bear the charges of marriage.—Ren. Com. pt. 1, c. 4, n. 6; Poth. Com. 461, 462, C. O. t. 10, n. 83, P. Mar. 87; 3 Mal. 258, 259; 12 P. Fr. 144 --; 3 Delv. 52; 2 Rog. 1849; C. N. 1530. [II. 447.]

1417. The husband retains the administration of the moveable and immoveable property of his wife, and as a consequence the right to receive all the moveable property she brings with her, or which accrues to her during the marriage; saving the restitution he is bound to make after its dissolution, or after a separation of property judicially pronounced.—Poth. Com. 463, P. Mar. 97; 12 P. Fr. 147; 3 Delv. 52; C. N. 1531. [II. 447.]

1418. If, amongst the moveable property brought by the wife or which accrues to her during marriage, there be things which cannot be used without being consumed, an appreciatory statement must be joined to the contract of marriage, or an inventory must be made of them at the time when they so accrue to her, and the husband is bound to give back their value according to the valuation. — ff. L. 42, de ju. dot.; 12 Toul. 553 --; 3 Mal. 259; 12 P. Fr. 147; 3 Delv. 52; 2 Rog. 1850; C. N. 1532. [II. 447.]

1419. The husband, with regard to such property, has all the rights and is subject to all the obligations of a usufructuary.—ff. L. 13, L. 15, L. 16, de imp. in res dot., L. 28, § 1, de don. int. vir.; 3 Mal. 260; 12 P. Fr. 148; 3 Delv. 52; 12 Toul. 553 --; 2 Rog. 1851; C. N. 1533. [II. 449.]

1420. The clause which declares that the consorts marry without community, does not prevent its being agreed that the wife, for her support and personal wants, shall receive her revenues in whole or in part, upon her own acquittances.—Bour. Com. pt. 1, c. 2, s. 1, dist. 1, n. 2; Poth. Com. n. 466; 3 Mal. 260; 12 P. Fr. 149 --; C. N. 1534. [II. 449.]

1421. The immoveables of the wife which are excluded from the community in the cases of the preceding articles are not inalienable. — Nevertheless they cannot be alienated without the consent of the husband, or, upon his refusal without judicial authorization.

—3 Mal. 260; 12 P. Fr. 150, 1. 3 Delv. 52; 2 Rog. 1821; C. N. 1535. [II. 449; III. 383.]

II. Of the clause of separation of property.

1422. When the consorts have stipulated by their contract of marriage that they shall be separate as to property, the wife retains the entire administration of her property moveable and immoveable and the free enjoyment of her revenues.—Leb. Com. l. 3, c. 2, s. 1, dist. 2, n. 30; Bour. l. 1, pt. 4, c. 4, s. 4, a. 15, 16; Poth. Com. 464, 465, P. Mar. 15, 98; 3 Mal. 260, 1; 12 P. Fr. 152, 3; 3 Delv. 53; 2 Rog. 1852; C. N. 1536. [II. 449.]

1423. Each of the consorts contributes to the expenses of marriage according to the covenants contained in their contract, and if there be none, and the parties cannot come to an understanding upon the subject, the court determines the contributory portion of each consort according to their respective means and circumstances.—Poth. Com. 464; 12 P. Fr. 158, 9; 3 Delv. 53; C. N. 1537. [II. 449.]

1424. The wife cannot in any case, nor by virtue of any stipulation, alienate her immoveables without the special consent of her husband, or, on his refusal, without being judicially authorized.—Every general authorization to alienate immoveables, which is given to the wife either by the contract of marriage or subsequently, is void.—C. P. 223; 1 Soef. cent. 4, c. 5; Lap. cent. 1, c. 67; Leb. Com. l. 2, c. 1, s. 4, n. 8; Poth. Com. 464, P. Mar. n. 98; 3 Mal. 262-4; 12 P. Fr. 155; C. N. 1538. [II. 449.]

1425. When the wife who is separated as to property has left the enjoyment of her property to her husband, the latter upon the demand which his wife may make, or upon the dissolution of the marriage, is bound to give up only the fruits which are then existing, and is not accountable for those which, up to such time, have been consumed.—Cod. L. 11, de pact. conv.; 3 Mal. 264; 12 P. Fr. 155--; 2 Rog. 1853; C. N. 1539. [II. 449.]

CHAPTER THIRD.

OF DOWER

SECTION I.

General provisions.

1426. There are two kinds of dower, that of the wife and that of the children.—These dowers are either legal or customary, or prefixed or conventional.—2 Lau. C. P. 251--; 2 Arg. 126; Poth. Douaire, 1, 2. [II. 451.]

1427. Legal or customary dower is that which the law, independently of any agreement, and as resulting from the mere act of marriage, establishes upon the property of the husband, in favor of the wife as usufructuary, and of the children as owners.—C. P. 247, 263; 2 Arg. 129; Poth. Douaire, 2, 291; 12 P. Fr. 165, 166. [II. 451.]

1428. Prefixed or conven-

tional dower is that which the parties have agreed upon, by the contract of marriage.—C. P. 255; 2 Lau. 272 --; 2 Pr. de la Jan. 134; Poth. Douaire, 2. [II. 451.]

1429. Conventional dower excludes customary; it is however lawful to stipulate that the wife and the children shall have the right to take either the one or the other, at their option.—C. P. 261; 2 Lau. 285; 2 Pr. de la Jan. 126; 2 Arg. 128, 142; Poth. Douaire, 138. [II. 451.]

1430. The option made by the wife, after the opening of the dower, binds the children, who must remain satisfied with whichever dower she has chosen. — If she die without having made the choice, the right of making it passes to the children. — C. P. 261; 2 Lau. 286; 2 Arg. 142; Poth. Douaire, 321. [II. 451.]

1431. If there be no contract of marriage, or if in that which has been made the parties have not explained their intentions on the subject, customary dower accrues by the sole operation of law.—But it is lawful to stipulate that there shall be no dower, and such a stipulation binds the children as well as the mother.—C. P. 247; 2 Pr. de la Jan. 127; Ren. Douaire, c. 4, n. 12; Poth. Douaire, n. 3, 5, 151. [II. 451.]

1432. Dower whether conventional or customary is not regarded as a benefit subject to the formalities of gifts, but as a simple marriage covenant. —Poth. Douaire 292 --; 12 P. Fr. 163. [II. 451.]

1433. The right to conventional dower accrues from the date of the contract of marriage, and the right to customary dower from the date of the celebration, or from the date of the contract if there be one in which it is stipulated.—Loi. Douaire, r. 20; 2 Lau. 256; Ren. Douaire; Poc. 224; Poth. Douaire, 147; 12 P. Fr. 164. [II. 451.]

1434. Customary dower consists in the usufruct for the wife, and the ownership for the children, of one half of the immoveables which belong to the husband at the time of the marriage, and of one half of those which accrue to him during marriage from his father or mother or other ascendants. —C. P. 248; 2 Pr. de la Jan. 122-3; 2 Lau. 255 --; 2 Arg. 130; Poth. Douaire, 12. [II. 451.]

1435. Immoveables which the husband has contributed as moveable under a clause of mobilization, in order to bring them into the community, are not subject to customary dower;—Neither are immoveables by fiction, composed of moveable objects which the husband has reserved to himself by the clause of realization in order to exclude them from the community.—2 Pr. de la Jan. 127; Poc. r. 18, p. 223; Ren. Douaire. c. 3, n. 9, 106; Lac. Douaire, s. 2, n. 7, 22; Leb. Suc. l. 2, c. 5, dist. 1, n. 21; 5 L. C. R. 325. [II. 451.]

1436. The customary dower resulting from a second marriage, when there are children born of the first, consists in a

half of the immoveables, not affected by the previous dower, which belong to the husband at the time of the second marriage, or which accrue to him during such marriage from his father or mother or other ascendants. — The rule is the same for all subsequent marriages which the husband may contract, when there are children of the previous marriages. —C. P. 253, 254; 2 Arg. 136; Ren. Douaire, c. 11, n. 1 --; Poth. Douaire, 4, 5. [II. 453.]

1437. Conventional dower, when there is no agreement to the contrary, also consists in the usufruct for the wife, and the ownership for the children, of the portion of the moveable or immoveable property which constitutes it according to the contract of marriage.—The parties may, however, modify this dower at will; they may stipulate, for example, that it shall belong to the wife in full ownership, to the exclusion of the children, and without return, or that the dower of the latter shall be different from that of their mother.—2 Pr. de la Jan. 134; 2 Arg 127, 128; Ren. Douaire, c. 4, n. 1 --; 12 P. Fr. 165, 166. [II. 453.]

1438. Dower, whether customary or conventional, is a right of survivorship which opens by the natural death of the husband.—It may however be opened and become exigible by the civil death of the husband, or by separation from bed and board, or separation of property only, if such effect result from the terms of the contract of marriage.—It may likewise be demanded in the case of the absence of the husband, under the circumstances and conditions expressed in articles 109 and 110.—C. P. 163; 2 Pr. de la Jan. 124; L. & B. let. D, c. 35; Month. Arr. 63; 1 Desp. pt. 1, t. 13, s. 5; 2 Bret. H. I. 4, q. 1; Ren. Douaire c. 5, n. 40 --; 2 Arg. 129, 130; Lac. Douaire, a. 9. n. 1, 2; Lam. t. 34, a. 4; 12 P. Fr. 167; C. 36, 1403. [II. 453.]

1439. If the wife be alive at the time of the opening of the dower, she enters immediately upon the enjoyment of her usufruct; the children cannot take possession of the property until after her death. —If the wife die first, the children enjoy the dower as owners from the moment of its opening.—Where the wife dies first, if at the death of the husband no children or grandchildren issue of the marriage be living, the dower is extinguished and the property remains in the succession of the husband. C. P. 263, 265; 2 Lau. 272, 287 --; Poc. Douaire, r. 8, p. 219; Loi. Douaire, r. 6; 2 Arg. 130, 142, 145, 146; Lam. Douaire, a. 32, 34; 12 P. Fr. 174. [II.453.]

1440. Conventional dower is taken from the private property of the husband.—C. P. 257, 260; 2 Lau. 281; 2 Pr. de la Jan. 135; 2 Arg. 140; Lam. Douaire, a. 35. [II. 453.]

1441. The wife and the children are seized of their respective rights in the dower from the time it opens, without the necessity of a judicial

demand; such a demand is however necessary against subsequent purchasers, in order to give rise, as regards them, to the fruits of the immoveables and the interest of the capital sums, which they have acquired in good faith, and which are subject to or charged with dower.—C. P. 251, 252, 256; 2 Lau. 280; Poc. r. 10, p. 220; 2 Arg. 132, 3; Loi. Douaire, r. 10; Poth. Douaire, 189, 332; Lam. Douaire, a. 9. [II. 453.]

1442. Customary dower, and conventional dower when it consists of immoveables, is a real right, and is governed by the law of the place where the immoveables subject to it are situated.—C. P. 249; 2 Pr. de la Jan. 128, 129; 2 Lau. 260; 2 Arg. 133. [II. 453]

1443. Neither the alienation by the husband of immoveables subject to or charged with dower, nor the charges or hypothecs which he may have imposed upon them, either with or without the consent of his wife, affect in any manner the rights of the latter or of the children, unless she has expressly renounced in conformity with the following article. —Such alienation and charges are equally without effect, as regards both the wife and the children, even when made in the name and with the consent of the wife, although she be authorized by her husband; subject to the same exception. C. P. 249, 250; 2 Lau. 260; 2 Pr. de la Jan. 130; 2 Arg 145; Poc. 225; Lam. Douaire, a. 5; C. 1301. [II. 455.]

1444. The wife who is of age may however renounce her right of dower, whether customary or conventional, upon such immoveables as her husband sells, alienates or hypothecates.—This renunciation may be made either in the act by which the husband sells, alienates or hypothecates the immoveable, or by a separate and subsequent act.—C. S. L. C. c. 37, s. 52, § 1, s. 54; 25 V. c. 11, s. 8. [II. 455.]

1445. Such renunciation has the effect of discharging the immoveable affected by dower from any claim which the wife may have upon it under that title, and neither she nor her heirs can exercise against any other property of the husband any recourse to be indemnified or compensated for the right thus abandoned; notwithstanding the provisions of this title or any other provisions of this code respecting the replacements, indemnities or compensations which consorts or other parties owe to each other in cases of partition. —C. S. L. C. c. 37, s. 52, § 2; C. 1303. [II. 455.]

1446. As to the dower of the children, it can be exercised only upon immoveables subject to the dower of their mother which have not been alienated or hypothecated by their father during the continuance of the marriage with her renunciation made in the manner prescribed in article 1444.—Children who have attained the age of majority may, after the death of their mother, renounce their dower in all cases in which the latter

could have done so herself, and in the same manner and with the same effect.—C. S. L. C. c. 37, s. 53. [II. 455.]

1447. Sales under execution, judgments in confirmation of title, and adjudications in forced licitations, when they take place before the opening of the customary dower, whether such dower results from the law alone, or has been stipulated, do not affect immoveables subject to dower.—Nevertheless if the sale under execution take place at the suit of a creditor whose claim is anterior and preferable to the dower, or if such creditor be collocated upon any of the said proceedings, the alienation or the confirmation is valid and the immoveable is discharged. The creditors whose claims rank subsequently, who in such case receive the surplus of the price, are bound to bring it back if the dower accrues, and cannot receive the moneys without giving security if the dower be apparent upon the proceedings. —When, as in the first case mentioned in this article, the dower is not extinguished by the sale or the judgement of confirmation, the party to whom the property has been adjudicated or who has obtained the judgment may likewise, when he has been evicted, oblige the creditors who have received the price to bring it back, and if the dower appear upon the proceedings, the creditors are not collocated unless they give security to bring back whatever portion of the dower they may receive. If the creditors refuse to give security the person to whom the property is adjudicated keeps or takes back the amount subject to dower, upon giving security himself that he will repay.—Customary dower when open does not fall under the rules of this article.—C. S. L. C. c. 37, s. 1 --; C. S. C. 25 V. c. 11, s. 2, 3, 4; 10 L. C. R. 301, Sims vs. Evans; Loi. Douaire, a. 7, 8; 2 Arg. 146, 147; L. & B. let. D, n. 20; Ren. c. 10, n. 1 --; Bac. D. J. c. 15, n. 72; Lac. Décret, 153, 154; Lam. Douaire, a. 20-23. [II. 455.]

1448. If the dower which is not yet open be the conventional dower, whether it consists in an immoveable or in an hypothecary claim, it is subject to the effect of the registry laws, and is extinguished by the sale under execution and the other proceedings mentioned in the preceding articles as in ordinary cases; saving to the parties interested their rights and recourse and the securities to which they may be entitled.—Conventional dower when open is subject to the ordinary rules,—C. S. L. C. c. 37, s. 1 --; 25 V. c. 11, s. 2-4; 6 L. C. R. 100, Forbes vs. Legault; 3 Rev. 478, ex parte Gibb, *à fort.* [II. 457.]

1449. The purchaser of an immoveable which is subject to or hypothecated for dower, cannot prescribe against either the wife or the children so long as such dower is not open.—Prescription runs against children of full age, during the life-time of their mother, from the period when the dower

opens.—Ren. Douaire, c. 15; 2 Arg. 148, 149; Lac. Douaire, 244; Poth. Douaire, n. 86,; C. P. 117; Lam. Douaire, a. 16. [II. 457.]

SECTION II.

Particular provisions as to the dower of the wife.

1450. The conventional dower of the wife is not incompatible with a gift of usufruct made to her by the husband; she enjoys under such gifts the property comprised in them, and takes her dower from the remainder, without diminution or confusion.—C. P. 257; 1 Lau. 192; 2 Id. 281; Loy. Douaire, 15; Poc. 221; Ric. on. a. 261 C. P.; 2 Arg. 140; Poth. Douaire, 264 --; Lam. Douaire, a. 35. [II. 457.]

1451. If the dower of the wife consist in money or rents, the wife, in order to obtain payment of it from the heirs and representatives of her husband, has all the rights and actions which belong to the other creditors of the succession. — Poth. Douaire, 194; Lam. Douaire, a. 15. [II. 457.]

1452. If the dower consist in the enjoyment of a certain portion of the property of the husband, a partition must be effected between the wife and the heirs of the husband, by which she receives the portion which she has a right to enjoy. —The widow and the heirs have reciprocally an action to obtain this partition, in the case of refusal on the part of either.—Loi. Douaire, r. 21; Poc. r. 20, p. 224; Poth. Douaire, 174 --; 12 P. Fr. 169. [II. 457.]

1453. The dowager, like other usufructuaries, has a right to the natural and industrial fruits attached by branch or root to the immoveable subject to dower when such dower opens, without being obliged to refund the expenses incurred by the husband in order to produce them.—The same rule applies to those who enter into the enjoyment of the ownership of such immoveable, after the extinction of the usufruct. —Poth. Douaire, 201, 272, 273; Lam. Douaire, a. 14; C. 450. [II. 457.]

1454. The dowager, as long as she remains a widow, enjoys the dower, whether customary or conventional, upon giving the security of her oath to restore it; but, if she remarry, she is bound to give the same security as any other usufructuary.—C. P. 264; 2 Arg. 132; Poth. Douaire, 221; Lam. Douaire, a. 36. [II. 457.]

1455. If the wife who has remarried cannot give the necessary security, her usufruct becomes subject to the provisions of articles 465, 466 and 467.—Poth. Douaire, 227; Lam. a. 36-38. [II. 459.]

1456. The dowager is bound to maintain the leases made by her husband subject to her dower, provided there has been no fraud nor excessive anticipation—Poc. r. 25, p. 227; Ren. Douaire, c. 14; Coq. q. 156; Poth. Douaire, 229; Lam. 45; C. 457. [II. 459.]

1457. Leases made by her during the term of her enjoy-

ment expire with her usufruct; nevertheless, the farmer or lessee has a right, and may be obliged, to continue in occupation during the remainder of the year which had begun when the usufruct expired, subject to the payment of the rent to the owner.—Ren. Douaire, c. 14; Poc. 227; Coq. q. 156; Poth. Douaire, 229, 279; Lam. a. 45; C. 457. [II. 459.]

1458. The dowager, like any other usufructuary, is liable for all the ordinary or extraordinary charges which affect the immoveable subject to dower, or which may be imposed upon it during the term of her enjoyment, as set forth in the title *Of Usufruct, of Use and Habitation.* — Ren. Douaire, c. 8, n. 8; Loi. r. 18; 2 Pr. de la Jan. 136; Poc. r. 26, p. 227; Lac. Douaire, 244; Poth. Douaire, 230 --; Lam. Douaire, a. 42. [II. 459.]

1459. She is liable only for the lesser repairs; for the greater repairs, the owner remains liable, unless they have been necessitated by the fault or negligence of the dowager. —C. P. 262; Poc. r. 28, p. 228; Loi. Douaire, r. 18; 2 Pr. de la Jan. 136, 138; Lac. Douaire, n. 45; Poth. Dou. 237; Lam. a. 45; C. 468, 469. [II. 459.]

1460. The dowager, like every other usufructuary, takes the things which are subject to the dower in the condition in which they are at the time of the opening.—The same rule applies to the dowable children, as regards the property itself, in cases where the usufruct of the wife does not take place.—If they do not take the property until after the expiration of the usufruct, or if at that time there be no dowable children, the succession of the wife is answerable, in the first case to such children, and in the second case to the heirs of the husband, according to the rules which relate to the enjoyment and the obligations of the usufructuary under particular title.—ff. L. 65, de usuf. L. 12, de u. et usuf.; 2 Pr. de la Jan. 138; 2 Arg. 202; Lac. Douaire, s. 5, p. 239, 244; Guy. Usufruit 393; Merl. Dou. § 2, n. 2; C. 455-476. [II. 459.]

1461. If nevertheless, during the marriage, considerable additions have been made to the thing, the wife cannot enjoy them without paying the excess of value, if her dower consist in ownership, or the interest of such excess, if it be in usufruct. —She may however demand the removal of such additions if it can be effected with advantage and without deteriorating the thing.—If they cannot be removed, the wife may, for the purpose of paying the excess of the value, obtain a licitation. — Dowable children who take the property without their mother having had the usufruct of it, fall under the same rules with regard to such additions.—If during the marriage, the thing subject to dower have suffered deterioration, to the benefit of the husband or of the community, the wife and the children who claim dower are entitled to compensation. —Leb. Suc. 383; Ren. Douaire, 30-1; 3 Gr. C. 906; Dupl.

Douaire, 249; Lem. Douaire, 307; Poth. 238-9; 7 N. D. 199; Lam. Douaire, a. 11-13; C. 417, 582. [II. 459.]

1462. The dower of the wife is terminated like any other usufruct by the causes enumerated in article 479.—2 Pr. de la Jan. 140; Poth. Douaire, 247-249, 253-255. [II. 461.]

1463. The wife may be deprived of her dower by reason of adultery or of desertion.—In either case, an action must have been instituted by the husband, and a subsequent reconciliation must not have taken place; the heirs, in such case, can only continue the action commenced, if it have not been abandoned.—2 Pr. de la Jan. 141; Poc. r. 29-31; Loi. Douaire, r. 39; Coq. q. 147; Poth. Douaire, 256 --; Lam. Dou. a. 47-49; C. 187, 211; 1 Rev. 450. [II. 461.]

1464. The wife may also be declared to have forfeited her dower by reason of the abuse she has made of her enjoyment, under the circumstances and modifications set forth in article 480.—Ren. Douaire, c. 12, n. 21, 22; Poc. r. 28, p. 228; Poth. Douaire, 262, 263; C. 480. [II. 461.]

1465. If the wife be declared to have forfeited her usufruct for any of the causes above mentioned, or if, after the opening of the dower, she renounce it simply and absolutely, the dowable children take the property from the time of the renunciation, or of the forfeiture, if it take place after the opening.—Lam. Douaire, a. 65. [II. 461.]

SECTION III.

Particular provisions as to the dower of children.

1466. The children entitled to dower are those who are born of the marriage for which it was constituted.—Children of the consorts who were born before the marriage, but are legitimated by it, are deemed to be children of the marriage; so are those who were conceived at the time of their father's death and are born afterwards; and so are also the grandchildren whose father being a child of the marriage, died before the opening of the dower. — Those children only can claim dower who were capable of succeeding to their father at the time of his death. —Poth. Douaire, 344 --, 392; Lam. Dou. a. 56, 63; 12 P. Fr. 374. [II. 461.]

1467. A child who assumes the quality of heir to his father, even under benefit of inventory, can have no share in the dower.—C. P. 250, 251, 254; 2 Lau. 266 --; Poth. Douaire, 350, 351; 2 Arg. 143; 2 Pr. de la Jan. 143. [II. 461.]

1468. In order to be entitled to dower, the child is bound to return into the succession of his father all such benefits as he has received from him, in marriage or otherwise, or to take less in the dower.—C. P. 252; 2 Lau. 269; 2 Pr. de la Jan. 144; 2 Arg. 145, 146; Poth. Douaire, 352 --; Lam. Douaire, a. 62. [II. 461.]

1469. The dowered children are not bound to pay the

debts which have been contracted by their father since the marriage; as to those which were contracted previously, they are only liable hypothecarily for them, with a recourse against the other property of their father.—C. P. 250; 2 Lau. 262; 2 Arg. 255; Lam. Douaire, a. 62. [II. 463.]

1470. When a conventional dower consists in a sum of money to be paid once for all, it is to all intents deemed moveable.—C. P. 259; 2 Lau. 284. [II. 463.]

1471. After the opening of the dower and the termination of the usufruct of the wife, the property composing such dower is divided amongst the children and grandchildren entitled to it, in the same manner as if it had fallen to them by succession.—The shares of those who renounce remain in the succession, and do not increase the shares of the other children who take dower.—C. P. 250; 2 Pr. de la Jan. 143; 2 Arg. 141, 143, 144; Poth. Douaire, 393-395; Lam. a. 61; 12 P. Fr. 176. [II. 463]

TITLE FIFTH.

OF SALE.

CHAPTER FIRST.

GENERAL PROVISIONS.

1472. [Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay for it.—It is perfected by the consent alone of the parties, although the thing sold be not then delivered; subject nevertheless to the provisions contained in article 1027 and to the special rules concerning the transfer of registered vessels.] —Dom. l. 1, t. 2, s. 1, n. 1, 2; Tr. Vente, n. 4, 37 --; 6 Marc. 142 --; C. 1022, 1025-1027; C. N. 1582, 1583. [II. 39; III, 383.]

1473. The contract of sale is subject to the general rules relating to contracts and to the effects and extinction of obligations declared in the title *Of Obligations*, unless it is otherwise specially provided in this code.—C. N. 1584. [II. 39.]

1474. When things moveable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured; but the buyer may demand the delivery of them or damages according to circumstances—ff. L. 8, De per. et com. rei vend.; L. 35, § 5, De contr. empt.; Poth. Vente, n. 308; 6 Marc. 149; Tr. Vente, n. 86, 87; 14 Fen. 4, 21, 85, 153, 182, 183; C. N. 1585. [II. 39.]

1475. The sale of a thing upon trial is presumed to be made under a suspensive condition, when the intention of the parties to the contrary is not apparent.—ff. L. 3, L. 34; § 5, De contr. empt., L. 31, § 32, De æd. ed.; Dom. l. 1, t. 2, s. 4, n. 8; Poth. Vente, n. 264-6; 6 Marc. 156; Tr. Vente, n. 106, 107; C. N. 1588. [II.39.]

1476. A simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favor according to the terms of the promise, and, in default of so doing, that the judgment shall be equivalent to such deed and have all its legal effects; or he may recover damages according to the rules contained in the title *Of Obligations*.—Poth. Vente, 479; Bard. Arr. 2 Mar. 1627; J. A. Arr. 28 May 1658; Perrault vs. Arcand, 4 L. C. R. 449; C. N. 1589. [II. 39.]

1477. If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it; he who has given the earnest, by forfeiting it, and he who received it, by returning double the amount. — Poth. Vente, 500 --; C. L. 2438; C. C. V. 1122; C. N. 1590. [II. 39.]

1478. A promise of sale with tradition and actual possession is equivalent to sale.—Kerr & Livingston, 1 L. C. R. 275; Gosselin & G. T. R., 9 L. C. R. 315; Patton & Gosselin, 23rd May, 1856; C. N. 1589. [II. 41.]

1479. The expense of the title deed and other accessories to a sale is borne by the buyer, unless it is otherwise stipulated.—C. L. 2441; C. C. V. 1123; C. N. 1593. [II. 41.]

1480. The articles of this title, in so far as they affect the rights of third persons, are subject to the special modifications and restrictions contained in the title *Of Registration of Real Rights*. [II. 41.]

1481. Tavern-keepers, or others, selling to persons other than travellers, intoxicating liquors to be drunk on the spot, have no action for the recovery of the price of such liquors.—C. P. 128; Guy. Cabaretier, 575; C. O. 267; N. D. Cabaret, n. 16, Aubergiste, n. 4. [II. 41.]

CHAPTER SECOND.

OF THE CAPACITY TO BUY OR SELL.

1482. The capacity to buy or sell is governed by the general rules, relating to the capacity to contract, contained in chapter first, of the title *Of Obligations*.—C. N. 1594. [II. 41.]

1483. Husband and wife cannot enter into a contract of sale with each other.—Poth. Don. M. n. 78; Dum. on 156 C. P. n. 5; 12 Toul. 62; 6 Marc. 185; C. C. V. 1125; C. P. 282; 2 Pi. 197; C. N. 1595. [II. 41.]

1484. The following persons cannot become buyers, either by themselves or by parties interposed, that is to say:—Tutors or curators, of the property of those over whom they are appointed, except in sales by judicial authority;—Agents, of the property which

they are charged with the sale of;—Administrators or trustees, of the property in their charge, whether of public bodies or of private persons;—Public officers, of national property, the sale of which is made through their ministry. —The incapacity declared in this article cannot be set up by the buyer; it exists only in favor of the owner and others having an interest in the thing sold.—ff. L. 34, § 7, L. 46, De contr. empt.; Cod. L. 5, De contr. empt.; Lam. arr. t. 4, a. 96, t. 22, a. 27; Ord. 1524, a. 23; O. O. 54; O. 1629, a. 94; Dom. l. 1, t. 2, s. 8, intr. §, & n. 1, 2; Poth. Vente, 13; 6 Marc. 190-193; 1 Tr. Vente, n. 187--; C. L. 2421, 2422; C. C. V. 1126, 1127; C. N. 1596. [II. 41.]

1486. Judges, advocates, attorneys, clerks, sheriffs, bailiffs and other officers connected with courts of justice, cannot become buyers of litigious rights which fall under the jurisdiction of the court in which they exercise their functions.—C. N. 1597. [II. 41.]

CHAPTER THIRD.

OF THINGS WHICH MAY BE SOLD.

1486. Every thing may be sold which is not excluded from being an object of commerce by its nature or destination or by special provision of law. — C. 1059-1061; Poth. Vente, 10, 11; C. N. 1598. [II. 41.]

1487. [The sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles. The buyer may recover damages of the seller, if he were ignorant that the thing did not belong to the latter.]—Poth. Vente, 7; 1 Tr. Vente, n. 230, 231, 236; 6 Marc. 208; Cad. 196, 7; C. L. 2427; C. C. V. 1130; C. N. 1599. [II. 43.]

1488. [The sale is valid if it be a commercial matter, or if the seller afterwards become owner of the thing.] — Tr. Vente, n. 236; 6 Marc. 208; Cad. l. c. [II. 43.]

1489. If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it.—Lam. arr. t. 21, a. 96; Poth. Chep. n. 45, 48, 50; Tr. Vente, n. 42; Merl. Vol. s. 4, § 1, n. 2; C. C. V. 1682; C. 2268; C. N. 2280. [II. 43.]

1490. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed.—C. S. L. C. c. 66; C. L. 3474. [II. 43.]

CHAPTER FOURTH.

OF THE OBLIGATIONS OF THE SELLER.

SECTION I.

General provisions.

1491. The principal obligations of the seller are: 1. The delivery, and, 2. The warranty of the thing sold.—Poth. Vente, 41, 42; C. N. 1603. [II. 43.]

SECTION II.

Of delivery.

1492. Delivery is the transfer of a thing sold into the power and possession of the buyer.—Dom. l. 1, t. 2, s. 2, n. 5; C. N. 1604. [II. 43.]

1493. [The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed.]—ff. L. 9, § 6, De acq. rer.; L. 21; L. 25, § 1, De acq. poss.; L. 47, De contr. empt.; L. 1, De per. rei vend.; Cod. L. 1, L. 28, De don.; Poth. Vente, 313-315; Dom. l. 1, t. 2, s. 2, n. 7; 6 Marc. 221-2; 5 Boi. 643; 1 Tr. Vente, n. 675-8; C. L. 2455; C. C. V. 1136; C. N. 1605. [II. 45.]

1494. The delivery of incorporeal things is made by the delivery of the titles, or by the use which the buyer makes of such things with the consent of the seller.—Dom. l. c.; Poth. Vente, n. 316; C. L. 2547; C. N. 1607; C. 1570. [II. 45.]

1495. The expenses of the delivery are at the charge of the seller, and those of removing the thing are at the charge of the buyer, unless it is otherwise stipulated.—Poth. Vente, n. 42 --; C. L. 2459; C. N. 1608. [II. 45.]

1496. The seller is not obliged to deliver the thing if the buyer do not pay the price, unless a term has been granted for the payment of it.—ff. L. 13, § 8, De act. empti.; Dom. l. 1, t. 2, s. 3, n. 8; Poth. Vente, 50, 63, 65; C. L. 2463; C. N. 1612. [II. 45.]

1497. Neither is the seller obliged to deliver the thing, when a delay for payment has been granted, if the buyer since the sale have become insolvent, so that the seller is in imminent danger of losing the price, unless the buyer gives security for the payment at the expiration of the term.—Poth. Vente, 67, Dom. l. 1, t. 1, s. 2, n. 22; C. L. 2464; C. N. 1613. [II. 45.]

1498. The thing must be delivered in the state in which it was at the time of the sale, subject to the rules relating to deterioration contained in the title *Of Obligations*.—From the time of sale all the profits of the thing belong to the buyer.—Author. under a. 1150; Poth. Vente, n. 47, B. R. n. 48; C. L. 2465; C. C. V. 1145; C. N. 1614. [II. 45.]

1499. The obligation to deliver the thing comprises its accessories and all that has been designed for its perpetual use.—ff. L. 17, § 7, De act. emp.; Poth. Vente, 47, Intr. 47, 48; C. 1024; C. L. 2466; C. N. 1615. [II. 45.]

1500. The seller is obliged to deliver the full quantity sold as it is specified in the contract, subject to modifications hereinafter specified.—ff. L. 51, De contr. empt. L. 7, § 1, De per. et com. rei vend.; Poth. Vente, 250-2; C. N. 1616. [II. 45.]

1501. [If an immoveable be sold with a statement, in whatever terms expressed, of its superficial contents, either at a certain rate by measure-

ment, or at a single price for the whole, the seller is obliged to deliver the whole quantity specified in the contract; if such delivery be not possible, the buyer may obtain a diminution of the price according to the value of the quantity not delivered. — If the superficial contents exceed the quantity specified, the buyer must pay for such excess of quantity, or he may at his option give it back to the seller.]—Dom. l. 1, t. 2, s. 11, n. 15; Poth. Vente, 250-8; Voët, ad pand. De contr. empt. n. 7; Merl. Vente, § 1, n. 10; 6 Marc. 235; 1 Tr. Vente, n. 336, *n.* 2, n. 338 --; 1 Bour. 482; 2 Hen. 548, l. 4, c. 6, q. 85, n. 1, 2; 1 Desp. 46, n. 15; Lap. let. G. n. 6; 13 P. Fr. 81; 5 Boi. 655, *n.* 2; C. N. 1617, 1618, 1619. [II. 47.]

1502. [In either of the cases stated in the last preceding article, if the deficiency or excess of quantity be so great, in comparison with the quantity specified, that it may be presumed the buyer would not have bought if he had known it, he may abandon the sale and recover from the seller the price, if paid, and the expenses of the contract, without prejudice in any case to his claim for damages.]—16 Dur. n. 223; 3 Delv. 138, *n.*; 1 Duv. n. 286; 4 Zach. 289, n. 29, 30; 6 Marc. 236; Title *Of Obligations*, c. 6; C. N. 1618, 1619, 1620; Tr. Vente, n. 330, 331. [II. 47.]

1503. [The rules contained in the last two preceding articles do not apply, when it clearly appears from the description of the immoveable and the terms of the contract that the sale is of a certain determinate thing, without regard to its quantity by measurement, whether such quantity is mentioned or not.] [II. 47.]

1504. The action for supplement of price on the part of the seller, or for diminution of price, or for vacating the contract, on the part of the buyer, is subject to the general rules of prescription.—C. N. 1622. [II. 47.]

1505. If two immoveable properties be sold by the same contract, at a single price for the whole, with a declaration of the contents of each, and in one the quantity be less than stated and in the other greater, the deficiency of the one is compensated by the excess of the other so far as it goes, and the action of the buyer or seller is modified accordingly. — ff. L. 42, De contr. empt.; Poth. Vente, 256; C. N. 1623. [II. 49.]

SECTION III.

Of warranty.

GENERAL PROVISIONS.

1506. The warranty to which the seller is obliged in favor of the buyer is either legal or conventional. It has two objects:

1. Eviction of the whole or any part of the thing;

2. The latent defects of the thing.—ff. L. 3, De act. empt., L. 21, L. 38, De æd. ed.; Poth. Vente, 81, 82, 181, 202; C. L.

2450, 2451; C. N. 1625. [II. 49.]

1507. Legal warranty is implied by law in the contract of sale without stipulation. Nevertheless the parties may, by special agreement, add to the obligations of legal warranty, or diminish its effect, or exclude it altogether.— ff. L. 21, De æd. ed.; Poth. Vente, n. 202, 210, 229, 230; Dom. l. 1, t. 2, s. 10, n. 6, 7; C. N. 1627. [II. 49.]

§ 1. *Of warranty against eviction.*

1508. The seller is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale, and against incumbrances not declared and not apparent at the time of the sale.—ff. L. 1, De evic. L. 11, § 8, 11, De act. empti; Cod. L. 6, De evic.; Poth. Vente, n. 86, 200; Dom. l. c. n. 2, 3, 5; Guy. Garantie, 726; 6 Marc. 252, s. 2; C. N. 1626. [II. 49.]

1509. Although it be stipulated that the seller is not obliged to any warranty, he is nevertheless obliged to a warranty against his personal acts. Any agreement to the contrary is null.—Poth. Vente, 183, 4; Dom. l. c. n. 8; C. N. 1628. [II. 49.]

1510. In like manner, when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer know at the time of the sale the danger of eviction or had bought at his own risk.—ff. L. 11, § 18, De act. empt.; Poth. Vente, 185, 6; C. N. 1629. [II. 49.]

1511. Whether the warranty be legal or conventional, the buyer, in case of eviction, has a right to claim from the seller:

1. Restitution of the price;

2. Restitution of the fruits in case he is obliged to pay them to the party who evicts him;

3. The expenses incurred, as well in his action of warranty against the seller as in the original action;

4. Damages, interest and all expenses of the contract;

—Subject nevertheless to the provision contained in the article next following.—ff. L. 60, L. 70, De evict.; Poth. Vente, 118, 123, 128, 130; Dom. l. c. n. 12, 13; C. N. 1630. [II. 49.]

1512. If in the case of warranty the causes of eviction were known to the buyer at the time of the sale, and there be no special agreement, the buyer has a right to recover only the price of the thing sold.—Poth. Vente, n. 187-190; 2 Delv. 154. [II. 49.]

1513. The seller is obliged to make restitution of the whole price of the thing sold, although, at the time of eviction, it be found to be diminished in value, or deteriorated, either by the neglect of the buyer, or by a fortuitous event; unless the buyer has derived a profit from the deterioration caused

by him, in which case the seller may deduct from the price a sum equal to such profit.—ff. L. 43, De act. empt.; Dum. De eo q. int. n. 68, 69; Poth. Vente, 69, 118; 1 Tr. Vente, n. 488; C. N. 1631, 1632; Dom. l. c. n. 14; Poth. n. 69. [II. 51.]

1514. If the thing sold be found, at the time of eviction, to have increased in value, either by or without the act of the buyer, the seller is obliged to pay him such increased value over the price at which the sale was made.—ff. L. 66, § 3, De evic.; Cod. L. 9, L. 16, L. 45, De evic.; Dom. l. c. n. 15, 16; Poth. Vente, 71, 132; C. N. 1633. [II. 51.]

1515. The seller is obliged to indemnify the buyer, or to cause him to be indemnified, for all repairs and useful expenditures made by him upon the property sold, according to their value.—Poth, Vente, 134; Tr. Vente, 510; C. N. 1634; Dom. l. c. n. 17, 18. [II. 51.]

1516. If the seller have sold the property of another, in bad faith, he is obliged to reimburse the buyer for all expenditures laid out by him upon it.—ff. L. 45, § 1, i. f., De act. empt.; Dom. l. c, n. 19; Poth. Vente, 137; C. N. 1635; C. 417. [II. 51.]

1517. If the buyer suffer eviction of a part only of the thing, or of two or more things sold as a whole, which part is nevertheless of such importance in relation to the whole that he would not have bought without it, he may vacate the sale.—ff. L. 1, De evic.; Poth. Vente, 144; C. L. 2487; C. N. 1636. [II. 51.]

1518. If in the case of eviction of a part of the thing, or things sold as a whole, the sale be not vacated, the buyer has a right to claim from the seller the value of such part, to be estimated proportionally upon the whole price, and also damages to be estimated according to the increased value of the thing at the time of eviction.—ff. L. 13, De evic.; Dum. De eo q. int. n. 67-69; Poth. Vente, 142, 143; 1 Tr. Vente, n. 517; 16 Dur. n. 300; 3 Delv. 149, *n.*; C. N. 1637. [II. 51.]

1519. [If the property sold be charged with a servitude not apparent and not declared, of such importance that it may be presumed the buyer would not have bought, if he had been informed of it, he may vacate the sale or claim indemnity, at his option, and in either case may bring his action so soon as he is informed of the existence of the servitude.]—ff. L. 1, § 2, De æd. ed.; Poth. Vente, 239; C. N. 1638. [II. 51.]

1520. Warranty against eviction ceases in case the buyer fails to call in the seller within the delay prescribed in the Code of Civil Procedure, if the latter prove that there existed sufficient ground of defence to the action of eviction.—Dom. l. 1, t. 2, s. 10, n. 21; Poth. Vente, n. 108, 9; C. N. 1640. [II. 53.]

1521. The buyer may enforce the obligation of warranty when, without the intervention of a judgment, he abandons the thing sold or admits

the incumbrance upon it, if he prove that such abandonment or admission is made by reason of a right which existed at the time of sale.—Poth. Vente, 94, 95. [II. 53.]

§ 2. *Of warranty against latent defects.*

1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.—ff. L. 1, § 1, De æd. ed.; Dom. l. 1, t. 2, s. 11, n. 1, 3; Poth. Vente, n. 202, 203, 232; Merl. Garantie, § 8, n. 2; C. N. 1641. [II. 53.]

1523. The seller is not bound for defects which are apparent and which the buyer might have known of himself. —ff. L. 48, § 4, De æd. ed.; Dom. l. c. & n. 10, 11; Poth. Vente, 207-9; C. N. 1642. [II. 53.]

1524. The seller is bound for latent defects even when they were not known to him, unless it is stipulated that he shall not be obliged to any warranty.—ff. L. 1, § 2, De æd. ed.; Dom. l. c. n. 5; Poth. Vente, n. 210; C. N. 1643. [II. 53.]

1525. When several principal things are sold together as a whole, so that the buyer would not have bought one of them without the other, the latent defect in one entitles him to vacate the sale for the whole.—ff. L. 34, § 1, L. 35, L. 38, De æd. ed.; Poth. Vente, 227, 8; Dom. l. c. n. 16; C. L. 2518. [II. 53.]

1526. The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value.—ff. L. 21, L. 23, § 7, l. c.; Dom. l. c. n. 2; Poth. Vente, 202, 217, 232; C. N. 1644. [II. 53.]

1527. If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.—He is obliged in like manner in all cases in which he is legally presumed to know the defects.—ff. L. 13, De act. empti; Dom. l. c. n. 7; Poth. Vente, 212-3, Ob. 163; C. N. 1645. [II. 53.]

1528. If the seller did not know the defects, or is not legally presumed to have known them, he is obliged only to restore the price and to reimburse to the buyer the expenses caused by the sale.—ff. L. 1, § 1, De act. empti; Dom. l. c. n. 6; Poth. l. c.; C. N. 1646. [II. 53.]

1529. If the thing perish by reason of any latent defect which it had at the time of the sale, the loss falls upon the seller, who is obliged to restore the price of it to the buyer, and otherwise to indemnify him, as provided in the two last preceding articles.—If it perish by the fault of the buyer or by a fortuitous event, the value

of the thing in the condition in which it was, at the time of the loss, must be deducted from his claim against the seller.—ff. L. 31, § 11; L. 47, § 1, De æd. ed.; Poth. Vente, 220-1; Dom. l. c. n. 9; 3 Delv. 152, n. 9; 16 Dur. n. 326; 1 Duv. n. 414; 4 Zach. 304, n. 11; 6 Marc. 285; 2 Tr. Vente, n. 568, p. 30; C. N. 1647. [II. 53.]

1530. The redhibitory action, resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made.—Poth. Vente, 231; Dom. l. c. n. 18; C. N. 1648. [II. 55.]

1531. In sales made under process of execution there is no obligation of warranty against latent defects.—ff. L. 1, § 3, De æd. ed.; Dom. l. c. n. 17; C. N. 1649. [II. 55.]

CHAPTER FIFTH.

OF THE OBLIGATIONS OF THE BUYER.

1532. The principal obligation of the buyer is to pay the price of the thing sold.—Dom. l. 1, t. 2, s. 3, n. 1; Poth. Vente, 278; C. N. 1650. [II. 55.]

1533. If the time and place of payment be not fixed by agreement, the buyer must pay at the time and place of the delivery of the thing.—ff. L. 41, § 1, De verb. ob.; L. 14, De reg. jur.; Dom. l. c. n. 2; Poth. Vente, 279; C. N. 1651. [II. 55.]

1534. The buyer is obliged to pay interest on the price in the cases following:

1. In case of a special agreement, from the time fixed by such agreement;

2. In case the thing sold be of a nature to produce fruits or other revenues, from the time of entering into possession of it. But if a term be stipulated for the payment of the price, the interest is due only from the expiration of such term;

3. In case the thing be not of a nature to produce fruits or revenues, from the time of the buyer being put in default.—ff. L. 13, § 20, 21, De act. empt; Poth. Vente, 283-6; Dom. l. c. n. 6; C. 1067, 1070, 1077; C. N. 1652. [II. 55.]

1535. If the buyer be disturbed in his possession or have just cause to fear that he will be disturbed by any action, hypothecary or in revendication, he may delay the payment of the price until the seller causes such disturbance to cease or gives security, unless there is a stipulation to the contrary.—C. S. L. C. c. 36, s. 31; C. C. V. 1185; C. L. 2535; C. N. 1653. [II. 55.]

1536. [The seller of an immovable cannot demand the dissolution of the sale by reason of the failure of the buyer to pay the price, unless there is a special stipulation to that effect.]—ff. l. 18, t. 3, de lege com.; Cod. L. 8, de contr. empt. et vend. L. 1, L. 3, de pact. in empt. et vend.; Poth. Vente, n. 458; 1 Desp. 48, n. 19; 2 Tr. Vente, n. 621, p. 96; Dom. l. c. n. 8, s. 12, n. 1; Poth. Vente, n. 475, § 4; C. L.

2539; C. N. 1654; C. 1065. [II. 57.]

1537. [The stipulation and right of dissolution of the sale of an immoveable, by reason of non-payment of the price, are subject to the rules relating to the right of redemption contained in articles 1547, 1548, 1549, 1550, 1551, 1552.—The right can in no case be exercised after the expiration of ten years from the time of sale. — Loy. Déguerpissement, l. 6, c. 3, n. 90; 2 Tr. Vente, n. 651; 2 Tr. Hypothèques, n. 466, p. 160. [II. 57.]

1538. [The judgment of dissolution by reason of non-payment of the price is pronounced at once, without any delay being granted by it for the payment of the price; nevertheless the buyer may pay the price with interest and costs of suit at any time before the rendering of the judgment.] — Poth. Vente, n. 459, al. 3, n. 461, al. 2. [II. 57.]

1539. The seller cannot have possession of the thing sold, upon the dissolution of the sale by reason of non-payment of the price, until he has repaid to the buyer such part of the price as he has received, with the costs of all necessary repairs, and of such improvements as have increased the value of the thing, to the amount of such increased value. If these improvements be of a nature to be removed, he has the option of permitting the buyer to remove them.—Poth. Vente, n. 469, 470. [II. 57.]

1540. The buyer is obliged to restore the thing with the fruits and profits received by him, or such portion thereof as corresponds with the part of the price remaining unpaid.—He is also answerable to the seller for the deteriorations of the property which have been caused by his fault.—Poth. Vente, 465, 466, 468. [II. 57.]

1541. The seller is held to have abandoned his right to recover the price when he has brought an action for the dissolution of the sale by reason of the non-payment of it.—ff. L. 4, § 2, De leg. com.; Poth. Vente, n. 461; 1 Desp. 73. [II. 57.]

1542. [A demand of the price by action or other legal proceeding does not deprive the seller of his right to obtain the dissolution of the sale by reason of non-payment.] -1 Tr. P. & H. n. 224 bis; 1 Duv. n. 444--; Merl. Q., Option, § 1, n. 10; Id. Rep. Résolution; 16 Dur. n. 239; ff. L. 7, c. t.; 1 Desp. 73, n. 3, 4; Poth. Vente, n. 462. [II. 57.]

1543. In the sale of moveable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer; without prejudice to the seller's right of revendication as provided in the title *Of Privileges and Hypothecs*.—C. P. 170; 1 Bour. 145, s. 1, 2; Tr. Vente, 531, Ad. to n. 1654; Tr. P. & H. n. 395; C. C. V. 1187; C. N. 1654. [II. 59.]

1544. In the sale of move-

able things the buyer is obliged to take them away at the time and place at which they are deliverable. [If the price have not been paid the dissolution of the sale takes place, in favor of the seller, of right and without the intervention of a suit, after the expiration of the delay agreed upon for taking them away, or if there be no such agreement, after the buyer has been put in default in the manner provided in the title *Of Obligations*;] without prejudice to the seller's claim for damages. — Poth. Vente, 290, 1; 2 Tr. Vente, 677 --; 1 Duv. 474; 4 Zach. 305, *n.* 1, 2, p. 306, *n.* 3, 4; C. N. 1657; 6 Marc. 296; 16 Dur. 87; C. 1067-1069, 1152. [II. 59.]

CHAPTER SIXTH.

OF THE DISSOLUTION AND OF THE ANNULLING OF THE CONTRACT OF SALE.

1545. Besides the causes of dissolution and of nullity already declared in this title, and those which are common to contracts, the contract of sale may be dissolved by the exercise of the right of redemption. —Dom. l. 1, t. 2, s. 12, Intr. a. & n. 6; Poth. Vente, n. 330, 385; C. N. 1658. [II. 59.]

SECTION I.

Of the right of redemption.

1546. The right of redemption stipulated by the seller entitles him to take back the thing sold upon restoring the price of it, and reimbursing to the buyer the expenses of the sale and the costs of all necessary repairs, and of such improvements as have increased the value of the thing, to the amount of such increased value. —The seller cannot have possession of the thing until he has satisfied all these obligations.— Dom. l. c. n. 6; Poth. Vente, 385, 411, 421-3-4-6; 2 Tr. Vente, 762; 6 Marc. 307-8; C. N. 1659, 1673. [II. 59.]

1547. When the seller takes back the property under his right of redemption, he receives it free from all incumbrances with which the buyer may have charged it.—Dom. l. c. n. 7; Poth. Vente, 430; C. N. 1673. [II. 61.]

1548. [The right of redemption cannot be stipulated for a term exceeding ten years. —If it be stipulated for a longer term, it is reduced to the term of ten years.]—Dom. l. c. n. 9; Poth. Vente, 433 --, C. O. t. 14, s. 2; C. L. 2546; C. N. 1660. [II. 61.]

1549. [The stipulated term is to be strictly observed. It cannot be extended by the court.]—C. L. 2547; C. N. 1661. [II. 61.]

1550. [If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.]—C. L. 2548; C. N. 1662. [II. 61.]

1551. [The term runs against all persons, including minors and those otherwise incapable in law, reserving to the latter such recourse as they

may be entitled to.]—C. L. 2549; C. N. 1663. [II. 61.]

1552. The seller of immoveable property may exercise his right of redemption against a second buyer, although the right be not declared in the second sale.—Poth. Vente, 396-8, 428; Tr. Vente, 728-9; C. N. 1664. [II 61.]

1553. The buyer of a thing subject to a right of redemption holds all the rights which the seller had in the thing. He may prescribe as well against the true proprietor as against those having claims and hypothecs on the thing.—Poth. Vente, 385, 402, i. f.; C. L. 2551; C. N. 1665. [II. 61.]

1554. He may set up the benefit of discussion against the creditors of the seller.—C. L. 2552; C. N. 1666. [II. 61.]

1555. If the buyer of an undivided part of an immoveable subject to the right of redemption become afterwards the buyer of the whole property, upon a sale by licitation instituted against him, and such right be not purged, he may oblige the seller who wishes to exercise it to take back the whole property.—2 Tr. Vente, 744-5; 6 Marc. 304; 16 Dur. n. 413; C. S. L. C. c. 48, s. 5; C. N. 1667. [II. 61.]

1556. If several persons sell conjointly, and by one contract, an immoveable which is their common property, with a right of redemption, each of them can exercise his right for the part only which belonged to him.—Dum. de divid. et indiv. n. 582 --; Poth. Vente, 397; 2 Tr. Vente, 746 --; C. title *Of Obligations*, c. 7, s. 5; C. N. 1668. [II. 61.]

1557. The rule declared in the last preceding article applies also if one seller of an immoveable have left several heirs; each of the coheirs can exercise the right of redemption for the part only which he has in the succession of the seller.—Dum. Poth. Tr. l. c.; C. N. 1669. [II. 63.]

1558. In the case stated in the two last preceding articles the buyer may, if he think fit, compel the co-vendor or the coheir to take back the whole of the property sold with the right of redemption, and in default of his so doing, he may cause the suit of such co-vendor or coheir for a part of the property to be dismissed.—Dum. Poth. Tr. l. c.; C. N. 1670. [II. 63.]

1559. If the sale of an immoveable belonging to several owners be made not conjointly of the whole property together, but by each of them of his part only, they may exercise their right of redemption separately, each for the portion which belonged to him, and the buyer cannot oblige him to take back the whole.—Poth. Vente, 396; Tr. Vente, 754, 755; 6 Marc. 306; C. N. 1671. [II. 63.]

1560. If an immoveable have been sold to several buyers, or to one buyer who leaves several heirs, the right of redemption can be exercised against each of the buyers or coheirs for his part only; but

if there have been a partition of the property among the coheirs, the right may be exercised for the whole property against any one of them to whom it has fallen. — Dum. Poth. l. c.; 2 Tr. Vente, 756 --; C. N. 1672. [II. 63.]

SECTION II.

Of the annulling of sale for cause of lesion.

1561. The rules relating to the avoiding of contracts for cause of lesion are declared in the title *Of Obligations.*— C. 1021; C. N. 1674. [II. 63.]

CHAPTER SEVENTH.

OF SALE BY LICITATION.

1562. If a thing, either moveable or immoveable, held in common by several proprietors cannot be partitioned conveniently and without loss, or if in a voluntary partition of a property held in common there be a part which none of the coproprietors is able or willing to take, a public sale of it is made to the highest bidder, and the price is divided among them. —Strangers are admitted to bid at such sale. — Poth. Vente, 515; C. S. L. C. c. 48, s. 3, 5; C. 300; C. N. 1686. [II. 63.]

1563. The manner and formalities of proceeding in sales by licitation are declared in the Code of Civil Procedure.—C. N. 1688. [II. 63.]

CHAPTER EIGHTH.

OF SALE BY AUCTION.

1564. Sales by auction or public outcry are either forced or voluntary.—The rules relating to forced sales are declared in chapters seven and eleven of this title, and in the Code of Civil Procedure.—[II. 63.]

1565. The voluntary sale by auction of goods, wares, merchandise or effects, cannot be made by any person other than a licensed auctioneer, subject to the following exceptions:

1. The sale of goods or effects belonging to the crown, or seized by a public officer under judgment or process of any court or as being forfeited;

2. The sale of goods and effects of deceased persons or belonging to any dissolution of community of property or to any church;

3. Sales by the inhabitants in the rural districts, not for trading purposes, of their furniture, grain, cattle, and other property not being merchandise and stock in trade, when changing their residence or finally disposing of the same;

4. Sales by auction for municipal taxes under the act respecting municipalities.—C. S. L. C. c. 5, s. 1, 2, 7. [II. 63.]

1566. A sale by auction contrary to the provisions contained in the last preceding article, is not null; it merely subjects the contravening parties to the penalties imposed by law.—[II. 65.]

1567. The adjudication of a thing to any person on his bid or offer, and the entry of his name in the sale-book of the auctioneer completes the sale to him, and he becomes

owner of the thing, subject to the conditions of sale announced by the auctioneer, notwithstanding the rule contained in article 1235. The contract from that time is governed by the rules applicable to the contract of sale.—Sm. M. L. 496, 507; Chit. Con. 308, *n.* 2, p. 389, *n.* 1; Kt. 539, 540; 1 Sug. V. P. c. 3, s. 3, p. 130; C. L. 2586, 2587. [II. 65.]

1568. If the purchaser do not pay the price at which the thing was adjudged to him, in conformity with the conditions of sale, the seller may, after having given reasonable and customary notice thereof, again expose the thing to sale by auction, and if at the resale the price obtained for the thing be less than that for which it was adjudged to the first purchaser, the seller may recover from him the difference and all the expenses of the resale. But if at the resale a greater price be obtained for the thing, the first purchaser is not entitled to the benefit thereof, beyond the expenses of the resale, and he is not allowed to bid at such resale.—Chit. Con. 430 & *n.* 2, 4; 2 Kt. 504; Maxham & al, vs. Stafford, 5 L. C. J. 105; Ruston vs. Perry, n. 2155, 24th July, 1848, Montreal; C. L. 2589, 2590; A. D. Folle Enchère, n. 3; 1 Par. n. 131, p. 258; Poth. P. C. 254. [II. 65.]

CHAPTER NINTH.

OF THE SALE OF REGISTERED VESSELS.

1569. Special provisions concerning the sale of registered ships or vessels are contained in the fourth book of this code in the title *Of Merchant Shipping.*—[II. 65; III. 383.]

CHAPTER TENTH.

OF THE SALE OF DEBTS AND OTHER INCORPOREAL THINGS.

SECTION I.

Of the sale of debts and rights of action.

1570. [The sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature.]—C. 1494; C. N. 1689. [II. 67.]

1571. The buyer has no possession available against third persons until signification of the act of sale has been made, and a copy of it delivered to the debtor. He may, however, be put in possession by the acceptance of the transfer by the debtor, subject to the special provisions contained in article 2127.—C. P. 108; Poth. Ob. 502, Vente, 554; Lac. Transport, n. 17; 3 Mal. 366; C. N. 1690. [II. 67.]

1572. If before the signification of the act by one of the parties to the debtor he have paid to the seller, he is discharged.—Poth. Vente, 555; 2 Tr. Vente, 901; C. N. 1691. [II. 67.]

1573. The two last preceding articles do not apply to bills, notes or bank checks

payable to order or to bearer, no signification of the transfer of them being necessary; nor to debentures for the payment of money, nor to transfers of shares in the capital stock of incorporated companies, which are regulated by the respective acts of incorporation or the by-laws of such companies.—Notes for the delivery of grain or other things, or for the payment of money, and payable to order or to bearer, may be transferred by endorsement or delivery, without notice, whether they are payable absolutely or subject to a condition.—[II. 67.]

1574. The sale of a debt or other right includes its accessories, such as securities, privileges and hypothecs.—C. 1024, 1499; C. N. 1692, 1615. [II. 67.]

1575. Arrears of interest accrued before the sale are not included in it as an accessory of the debt.—A. D. Accessoires, n. 4; Guy. Accessoires, 108; Tr. Vente, n. 915; 6 Dur. n. 507; Duv. n. 221; 6 Marc. 634. [II. 67.]

1576. The seller of a debt or other right is bound by law to the warranty that it exists and is due to him, although the sale be without warranty. Subject nevertheless to the exception declared in article 1510.—ff. L. 6, De evic.; Poth. Vente, 559; Tr. Vente, 931, 5, 6; Loy. Garantie des rentes, c. 3, n. 11, i. f.; 1 Bour. 467, n. 19, 20; C. N. 1693. [II. 67.]

1577. When the seller by a simple clause of warranty obliges himself for the solvency of the debtor, the warranty applies only to his solvency at the time of sale, and is limited in amount to the price paid by the buyer.—ff. L. 74, De evic.; Loy. ib. c. 7, n. 7, 8; Poth. Vente, 570; 1 Bour. 467, n. 21 --; Lam. t. 22, a. 10 --; 2 Tr. Vente, 938 --, 948; C. N. 1694, 1695. [II. 69.]

1578. The preceding articles of this chapter apply equally to transfers of debts and rights of action against third persons by contracts other than sales, except gifts to which article 1576 does not apply.—Lac. Eviction, n. 26; Loy. Rentes, c. 1, n. 14; Ric. Donations, pt. 1, n. 954. [II. 69.]

SECTION II.

Of the sale of successions.

1579. [He who sells a right of succession without specifying in detail the property of which it consists is bound by law to warrant only his right as heir.]—C. N. 1696. [II. 69.]

1580. If the seller have received the fruits or revenues of any property, or the amount of any debt, or sold any thing making part of the succession, he is bound to reimburse the same to the buyer, unless they have been expressly reserved. —ff. L. 2, § 1, 3, De her. vend.; Cod. L. 5, De her. vend.; Poth, Vente, n. 530-532, 534, 536. 537; 2 Tr. 963; C. N. 1697. [II. 69.]

1581. The buyer, besides his obligations common to the contract of sale, is obliged to reimburse the seller for all

debts and expenses of the succession paid by him, to pay him the debts which the succession may owe him, and to discharge all debts and obligations of the succession for which he is liable; unless there is a stipulation to the contrary. —ff. L. 2, § 16-18 De her. vend.; Poth. Vente, 540-2, Suc. c. 5, a. 2, § 2; 2 Tr. Vente, 976, 977; C. N. 1698. [II. 69.]

SECTION III.

Of the sale of litigious rights.

1582. When a litigious right is sold, he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it. —Cod. L. 22, L. 23, L. 24, mand. vel cont.; Poth. Vente, 590; N. D. Cession de dr. lit.; 2 Tr. Vente, 985; C. N. 1699. [II. 69.]

1583. A right is held to be litigious when it is uncertain, and disputed or disputable by the debtor, whether an action for its recovery is actually pending or is likely to become necessary,—Cod. L. 1, In auth. de litig.; Poth. Vente, 583; N. D. l. c.; 2 Tr. Vente, n. 986; 6 Marc. 351; 2 Duv. n. 359, p, 444, 5; C. N. 1700. [II. 71.]

1584. The provisions contained in article 1582 do not apply:

1. When the sale has been made to a coheir or coproprietor of the right sold;

2. When it has been made to a creditor in payment of what is due to him;

3. When it has been made to the possessor of a property subject to the litigious right;

4. When the judgment of a court has been rendered affirming the right, or when it has been made clear by evidence and is ready for judgment.—Cod. L. 22, L. 23, L. 24, l. c.; Poth. Vente, 593-7; Leb. Suc. l. 4, c. 2, s. 5, n. 68; N. D. l. c. § 2, n. 4; 2 Tr. Vente, 998, 9, 1005 --; 6 Marc. 355, 6, n. 3; 2 Duv. 377, 8; C. N. 1701. [II. 71.]

CHAPTER ELEVENTH.

OF FORCED SALES AND TRANSFERS RESEMBLING SALE.

SECTION I.

Of forced sales.

1585. The creditor who has a judgment against his debtor may take in execution and cause to be sold, in satisfaction of such judgment, the property moveable or immoveable of his debtor, except only the articles specially exempted by law; subject to the rules and formalities provided in the Code of Civil Procedure.—C. S. L. C. c. 85, s. 1-3. [II. 71.]

1586. In judicial sales under execution, the buyer, in case of eviction, may recover from the debtor the price paid with interest and the incidental expenses of the title; he may also recover, from the creditors who have received it, the price with interest; saving

to the latter their exception of discussion of the property of the debtor.—ff. L. 74, § 1, De evic.; 2 Pi. 254; 13 Dur. n. 686; 16 Id. n. 265; Voet, P. De evic. n. 5; Poth. P. C. 254; Tr. Vente, 432, 522; 6 Marc. 256; C. L. 2590; Desjardins vs. Banque du Peuple, 10 L. C. R. 325. [II. 71.]

1587. The last preceding article is without prejudice to the recourse which the buyer has against the prosecuting creditor, by reason of informalities in the proceedings, or of the seizure of property not ostensibly belonging to the debtor. [II. 71.]

1588. The general rules concerning the effect of forced judicial sales in the extinction of hypothecs and of other rights and incumbrances, are declared in the title *Of Privileges and Hypothecs*, and in the Code of Civil Procedure. [II. 71]

1589. In cases in which immoveable property is required for purposes of public utility, the owner may be forced to sell it or be expropriated by the authority of law in the manner and according to the rules prescribed by special laws.—Poth. Vente, 511-4; O. 1303; L. & B. let. E, c. a. 1, 2; C. L. 2604 --; C. S. L. C. c. 70, s. 26 --, s. 42, 43, c. 24, s. 50. [II. 71.]

1590. In the case of sales and expropriations for purposes of public utility, the party acquiring the property cannot be evicted. The hypothecs and other charges are extinguished, saving to the creditors their recourse upon the price and subject to the special laws relating to the matter.—Poth. Vente, 513; C. S. L. C. ib. s. 43. [II. 73.]

1591. The rules concerning the formalities and proceedings in judicial and other forced sales and expropriations are contained in the Code of Civil Procedure and in the acts relating to municipal and other incorporated bodies; such sales and expropriations are subject to the rules generally applicable to the contract of sale, when these are not inconsistent with special laws or any article of this code. [II. 73.]

SECTION II.

Of the giving in payment.

1592. The giving of a thing in payment is equivalent to a sale of it, and makes the party giving liable to the same warranty.—The giving in payment, nevertheless, is perfected only by the actual delivery of the thing. It is subject to the provisions relating to the avoidance of contracts and payments contained in the title *Of Obligations*.—C. 1032 --; Cod. L. 4, De evic.; Poth. Vente, 600 --, 604, 605; 1 Tr. Vente, n. 7; 1 Duv. n. 45; Champ. et Rig Droits d'Enreg. v. Dation.; 1 Par. 203; C. L. 2625 --. [II. 73.]

SECTION III.

Of alienation for rent.

1593. The alienation in perpetuity of immoveable property for an annual rent, is equivalent to a sale. It is subject to the same rules as

the contract of sale in so far as they can be made to apply. —Poth. B. R. c. 1. [II. 73.]

1594. The rent may be payable either in money or in kind. Its nature and the rules to which it is subject are declared in the articles relating to rents contained in the second chapter of the first title of the second book.—Poth. B. R. n. 13; C. S. L. C. c. 51, s. 5. [II. 73.]

1595. The obligation to pay the rent is a personal liability; the purchaser is not discharged from it by abandonment of the property, nor is he discharged by reason of the destruction of the property by a fortuitous event or by irresistible force.—C. S. L. C. c. 51. [II. 73.]

TITLE SIXTH.

OF EXCHANGE.

1596. Exchange is a contract by which the parties respectively give to each other one thing for another.—[It is effected by consent, in the same manner as sale.]—ff. L. 1, De contr. empt., L. 1, § 1, 2, De rer. permut.; Poth. Vente, 617, 621; C. N. 1702, 1703. [II. 73.]

1597. If one of the parties, even after having received the thing given to him in exchange, prove that the other party was not owner of such thing, he cannot be compelled to deliver that which he has promised in counter-exchange, but only to return the thing which he has received.—ff. L. 1, § 1, 2, De rer. permut.; Poth. Vente, 621; C. N. 1704. [II. 75.]

1598. The party who is evicted of the thing he has received in exchange has the option of demanding damages or of recovering the thing given by him.—ff. l. c. § 3, 4; Poth. Vente, 623; C. N. 1705. [II. 75.]

1599. The rules contained in the title *Of Sale* apply equally to exchange, when not inconsistent with any article of this title.—Poth. Vente, 624; C. N. 1707. [II. 75.]

TITLE SEVENTH.

OF LEASE AND HIRE.

CHAPTER FIRST

GENERAL PROVISIONS.

1600. The contract of lease or hire has for its object either things or work, or both combined.—ff. L. 22, § 1, loc. cond. Voet, ad inst. l. 3, t. 25, § 1;

Cuj. Parat. in c. t.; Poth. Louage, n. 1; C. N. 1708. [II. 75.]

1601. The lease or hire of things is a contract by which one of the parties, called the lessor, grants to the other, called the lessee, the enjoyment of a thing, during a certain time, for a rent or price which the latter obliges himself to pay—Cuj. l. c.; Dom. l. 1, t. 4, s. 1, n. 1, 2; Poth. Louage, n. 1, 27, 39, 40; C. N. 1709. [II. 75.]

1602. The lease or hire of work is a contract by which one of the parties, called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay.—ff. l. c.; Cuj. l. c.; Lac. v. Louage, § 1; Tr. Louage, n. 64; 6 Marc. 419-424, 570; C. N. 1710. [II. 75.]

1603. The letting out of cattle on shares is a contract of lease or hire combined with a contract of partnership.—Dom. l. 1, t. 4, s. 1, n. 5; Poth. Chep. n. 2-4; Guy. Chep. 374; C. N. 1804, 1818. [II. 75.]

1604. The capacity to enter into a contract of lease or hire is governed by the general rules relating to the capacity to contract, contained in chapter one of the title *Of Obligations*.—[II. 75.]

CHAPTER SECOND.

OF THE LEASE OR HIRE OF THINGS.

SECTION I.

General Provisions.

1605. All corporeal things may be leased or hired, except such as are excluded by their special destination, and those which are necessarily consumed by the use made of them.—ff. L. 34, § 1, de cont. emp.; Dom. l. 1, t. 4, s. 1, n. 4; Poth. Louage, n. 9 --; Tr. Louage, n. 81, *n.* 1, 83; C. 1060 --; C. L. 2648; C. N. 1713. [II. 77.]

1606. Incorporeal things may also be leased or hired, except such as are inseparably attached to the person. If attached to a corporeal thing, as a right of servitude, they can only be leased with such thing.—ff. L. 44, loc. cond.; Poth. Louage, n. 18, 19; Tr. Louage n. 88, 89; C. 1060 --; C. L. 2649, 2650; C. N. 631, 634. [II. 77.]

1607. The lease or hire of houses and the lease or hire of farms and rural estates are subject to the rules common to contracts of lease or hire, and also to particular rules applicable only to the one or the other of them.—Dom. l. 1, t. 4, i. p. [II. 77.]

1608. Persons holding real property by sufferance of the owner, without lease, are held to be lessees, and bound to pay the annual value of the property.—Such holding is regarded as an annual lease or hire terminating on the first day of May of each year, if the property be a house, and on the [first day of October, if it be a farm or rural estate.]—It is subject to tacit renewal and to all the rules of law applicable to leases.—Persons so holding are liable to ejectment for non-payment of rent for a period exceeding three months,

and for any other causes for which a lease may be rescinded. C. S. L. C. c. 40, s. 16. [II. 77.]

1609. If the lessee remain in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the lessor, a tacit renewal of the lease takes place for another year, or the term for which such lease was made, if less than a year, and the lessee cannot thereafter leave the premises, or be ejected from them, unless notice has been given with the delay required by law.—ff. L. 13, § 11, L. 14, loc. cond.; Dom. l. 1, t. 4, s. 4, n. 7; Poth. Louage, n, 40, 342, 344; C. N. 1738, 1759. [II. 77.]

1610. When notice has been given the lessee cannot claim the tacit renewal, although he has continued in possession.—ff. L. 14, loc. cond.; Dom. l. 1, t. 4, s. 4, n. 8; Poth. Louage, n. 344; C. N. 1739. [II. 79.]

1611. The surety given for the lease does not extend to the obligations arising from the prolongation of it by tacit renewal.—ff. L. 13, § 11, loc. cond.; Cod. L. 7, De loc. et cond.; Dom. l. 1, t. 4, s. 4, n. 9; Poth. Louage, n. 366-7; C. N. 1740. [II. 79.]

SECTION II.

Of the obligations and rights of the lessor.

1612. The lessor is obliged by the nature of the contract:

1. To deliver to the lessee the thing leased;

2. To maintain the thing in a fit condition for the use for which it has been leased;

3. To give peaceable enjoyment of the thing during the continuance of the lease.—ff. L. 15, § 1, L. 25, § 1, 2, loc. cond.; Dom. l. 1, t. 4, s. 3, n. 1; Poth. Louage, n. 53, 54, 80, 106; C. N. 1719. [II. 79.]

1613. The thing must be delivered in a good state of repair in all respects, and the lessor is obliged, during the lease, to make all necessary repairs, except those which the tenant is bound to make, as hereinafter declared.—ff. L. 19, § 2, loc. cond.; Dom. l. c.; Poth. Louage, n. 106, 107; C. N. 1720. [II. 79.]

1614. The lessor is obliged to warrant the lessee against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not.—ff. L. 19, § 1, L. 60, § 7, loc. cond.; Dom. l. 1, t. 4, s. 3, n. 8, 10; Poth. Louage, n. 109 --; C. N. 1721. [II. 79.]

1615. The lessor cannot, during the lease, change the form of the thing leased.—Poth. Louage, n. 75; Guy. Bail, 18; C. N. 1723. [II. 79.]

1616. The lessor is not obliged to warrant the lessee against disturbance by the mere trespass of a third party not pretending to have any right upon the thing leased; saving to the lessee his right of damages against the trespasser, and subject to the exceptions declared in the following article.—ff. L. 55, loc. cond.; Cod. L. 1, L. 12, de loc.

et cond.; Poth. Louage, n. 81, 287; Tr. Louage, n. 257; C. L. 2673; C. N. 1725. [II. 79.]

1617. If the lessee's right of action for damages against the trespasser be ineffectual, by reason of the insolvency of the latter, or of his being unknown, his rights against the lessor are regulated according to article 1660.—Poth. l. c.; Tr. l. c.; Duv. Louage, n. 315. [II. 79.]

1618. If the disturbance be in consequence of a claim concerning the right of property, or other right in and upon the thing leased, the lessor is obliged to suffer a reduction in the rent, proportional to the diminution in the enjoyment of the thing, and to pay damages according to circumstances, provided the lessor be duly notified of the disturbance by the lessee; and upon any action brought by reason of such claim, the lessee is entitled to be dismissed from the cause, upon declaring to the plaintiff the name of the lessor.—ff. L. 9. loc. cond.; Dom. l. 1, t. 4, s. 3, n. 2; Poth. Louage, n. 82 --, 86, 88, 91, 286, 287; C. L. 2674; C. N. 1726, 1727. [II. 79.]

1619. The lessor has, for the payment of his rent and other obligations of the lease, a privileged right upon the moveable effects which are found upon the property leased.—ff. L. 7, L. 3, L. 4, i. p. & § 1, in q. caus. pign. v. hyp., L. 4, De pac.; C. P. 161, 171; Dom. l. 1, t, 4, s. 2, n. 12; Poth. Louage, n. 228, 233, 234; Jones & Lemesurier, 2 Rev. 317; Jones & Anderson, 2 L. C. R. 154; Aylwin et al. & Gilloran, 4 L. C. R. 360; C. L. 2675; C. N. 2102. [II. 81.]

1620. In the lease of houses the privileged right includes the furniture and moveable effects of the lessee, and, if the lease be of a store, shop or manufactory, the merchandise contained in it. In the lease of farms and rural estates the privileged right includes every thing which serves for the labor of the farm, the furniture and moveable effects in the house and dependencies, and the fruits produced during the lease.—ff. l. c.; Dom. l. c.; Poth. Louage, n. 228, 233, 234, 249, 252, 253; C. N. 2102. [II. 81.]

1621. The right includes also the effects of the undertenant, in so far as he is indebted to the lessee.—ff. L. 11, § 5, de pign. act.; C. P. 162; Poth. Louage, n. 235; 2 Arg. 288; C. L. 2676; C. N. 1753; F. C. P. 820. [II. 81.]

1622. It includes also moveable effects belonging to third persons, and being on the premises by their consent, express or implied, but not if such moveable effects be only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired, or to an auctioneer to be sold.—ff. L. 7, § 1, in q. caus. pign.; C. P. 161; Poth. Louage, n. 241, 5; C. L. 2677, 2678. [II. 81.]

1623. In the exercise of the privileged right the lessor may seize the things which are sub-

ject to it, upon the premises, or within eight days after they are taken away. If the things consist of merchandise, they can be seized only while they continue to be the property of the lessee.—C. P. 171; L. & B. n. 161, n. 1; Poth. Louage, n. 257, 261, P. C. 193; Ins. sur Conv. 203, 4; C. L. 2679; C. N. 2102. [II. 81.]

1624. The lessor has a right of action in the ordinary course of law, or by summary proceeding, as prescribed in the Code of Civil Procedure:

1. To rescind the lease: First, When the lessee fails to furnish the premises leased, if a house, with sufficient furniture or moveable effects, and, if a farm, with sufficient stock to secure the rent as required by law,—unless other security be given; Secondly, When the lessee commits waste upon the premises leased; Thirdly, When the lessee uses the premises leased for illegal purposes, or contrary to the evident intent for which they are leased;

2. To recover possession of the premises leased in all cases where there is a cause for rescission, and where the lessee continues in possession, against the will of the lessor, more than three days after the expiration of the lease, or without paying the rent according to the stipulations of the lease, if there be one, or according to article 1608, when there is no lease;

3. To recover damages for violation of the obligations arising from the lease or from the relation of lessor and lessee. —He has also a right to join with any action for the purposes above specified, a demand for rent, with or without attachment, and attachment in reception when necessary.—ff. L. 61, L. 54, § 1, loc. cond.; Cod. L. 3, de loc. et cond.; Dom. l. 1, t. 4, s. 2, n. 15, 16; Poth. Louage, n. 318, 322, 323; 2 Bour. 54, n. 16, 18; 55, n. 26; 56. n. 27 --; C. N. 1752, 1760, 1729. [II. 81.]

1625. The judgment rescinding the lease by reason of the non-payment of the rent is pronounced at once without any delay being granted by it for the payment; nevertheless the lessee may pay the rent with interest and costs of suit and thereby avoid the rescission at any time before the rendering of the judgment. [II. 83.]

SECTION III.

Of the obligations and rights of the lessee.

1626. The principal obligations of the lessee are:

1. To use the thing leased as a prudent administrator, for the purposes only for which it is designed and according to the terms and intention of the lease;

2. To pay the rent or hire of the thing leased.—ff. L. 25, § 3, L. 11, § 1, loc. cond.; Cod. L. 17, de loc. et cond.; Dom. l. 1, t. 4, s. 2, n. 1; Poth. Louage, n. 22-24; 2 Bour. 43, n. 1, 2, 46, n. 26; C. N. 1728. [II. 83.]

1627. The lessee is responsible for injuries and loss

which happen to the thing leased during his enjoyment of it, unless he proves that he is without fault.—ff. L. 11, § 2, 3, loc. cond., L. 23, de reg. juris.; Cod. L. 28, De loc. et cond.; Dom. l. 1, t. 4, s. 2, n. 4; Poth. Louage, n. 195, 197, 199, 200; C. N. 1732. [II. 83.]

1628. He is answerable also for the injuries and losses which happen from the acts of persons of his family or of his subtenants.—ff. L. 11, L. 25, § 7, L. 60, § 7, L. 30, § 4, loc. cond.; Dom. l. 1, t. 4, s. 2, n. 5; Poth. Louage, n. 193, 194; 2 Bour. 46, n. 31; C. N. 1735. [II. 83.]

1629. When loss by fire occurs in the premises leased, there is a legal presumption in favor of the lessor, that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss.—ff. L. 9, § 3, loc. cond.; Poth. Louage, n. 194; 2 Bour. 47, n. 33-37; Guy. Incendie, 122; Arg. l. 3, c. 27, p. 281; C. N. 1733. [II. 83.]

1630. The presumption against the lessee declared in the last preceding article exists in favor of the lessor only, and not in favor of the proprietor of a neighbouring property who suffers loss by fire which has originated in the premises occupied by such lessee.—Guy. l. c.; 11 Toul. 172; 6 Marc. 468. [II. 83.]

1631. If there be two or more lessees of separate parts of the same property, each is answerable for loss by fire, according to the proportion of his rent to the rent of the whole property; unless it is proved that the fire began in the habitation of one of them, in which case he alone is answerable for it; or some of them prove that the fire could not have begun with them, in which case they are not answerable.—Guy. Incendie, 125; 11 Toul. n. 170; Tr. Louage, n. 376; Poth. Louage, n. 194; C. N. 1734. [II. 83.]

1632. If a statement have been made between the lessor and lessee, of the condition of the premises, the latter is obliged to restore them in the condition in which the statement shews them to have been; with the exception of the changes caused by age or irresistible force.—ff. L. 30, § 4, loc. cond.; 2 Bour. 46, n. 30, p. 48, n. 42, 43; Tr. Louage, n. 341; C. N. 1730. [II. 83.]

1633. If no such statement as is mentioned in the preceding article have been made, the lessee is presumed to have received the premises in good condition, and is obliged to restore them in the same condition; saving his right to prove the contrary.—ff. L. 11, § 2, loc. cond.; Poth. Louage, 197, 221; Bour. l. c.; C. N. 1731. [II. 85.]

1634. If during the lease the thing leased be in urgent want of repairs, which cannot be deferred, the lessee is obliged to suffer them to be made, whatever inconvenience they may cause him, and although he may be deprived, during the making of them, of the

enjoyment of a part of the thing;—If such repairs became necessary before the making of the lease he is entitled to a diminution of the rent according to the time and circumstances; and in any case, if more than forty days be spent in making such repairs, the rent must be diminished in proportion to the time and the part of the thing leased of which he has been deprived.—If the repairs be of a nature to render the premises uninhabitable for the lessee and his family, he may cause the lease to be rescinded.—ff. L. 30, L. 27, loc. cond.; Poth. Louage, n. 77-79, 140, 141, 150, C.O. t. 19, n. 17; 2 Bour. 41, s. 4; N. D. Bail à ferme et à loyer, § 4, n. 8; Guy. Bail, 18; Tr. Louage, n. 246 --; Peck & Harris, 12 L. C. R. 355; Lyman & Peck, Ib. 368; C. L. 2670; C. N. 1724. [II. 85.]

1635. The tenant is obliged to make certain lesser repairs which become necessary in the house or its dependencies, during his occupancy. These repairs, if not specified in the lease, are regulated by the usage of the place. The following, among others, are deemed to be tenant's repairs, namely, repairs :—To hearths, chimney-backs, chimney-casings and grates ; — To the plastering of interior walls and ceilings;—To floors, when partially broken, but not when in a state of decay;—To window-glass, unless it is broken by hail or other inevitable accident, for which the tenant cannot be holden;— To doors, windows, shutters, blinds, partitions, hinges, locks, hasps and other fastenings.—2 Bour. 43, n. 5, p. 47, n. 39, p. 48, n. 40 --; Poth. Louage, n. 219, 220, 222, 224, C. O. t. 19, n. 24; Desg. 466, n. 10; Ins. sur Conv. 217; Tr. Louage, n. 551 --; C. 468, 469; C. N. 1754. [II. 85.]

1636. The tenant is not obliged to make the repairs deemed tenant's repairs when they are rendered necessary by age or by irresistible force.—ff. Arg. ex. L. 9, § 4, loc. cond.; Cod. L. 28, de loc. et cond; Poth. Louage, n. 219-221; 2 Bour. 47, n. 38, p. 48, n. 40; C. N. 1755. [II. 85.]

1637. In case of ejectment or rescission of the lease for the fault of the lessee, he is obliged to pay the rent up to the time of vacating the premises and also damages, as well for loss of rent afterwards, during the time necessary for reletting, as for any other loss resulting from the wrongful act of the lessee.—ff. L. 55, § 2. loc. cond.; Dom. l. 1, t. 4, s. 2, n. 8; 6 Marc. 494; C. N. 1760. [II. 85.]

1638. The lessee has a right to sublet, or to assign his lease, unless there is a stipulation to the contrary.—If there be such a stipulation, it may apply to the whole or a part only of the premises leased, and in either case it is to be strictly observed; subject to the provisions of *The Insolvent Act of* 1864.—ff. L. 60, loc. cond.; Cod. L. 6, de loc. et cond.; Dom. l. 1, t. 4, s. 1, n. 8;

Poth. Louage, n. 43, 280; 2 Bour. 41, n. 17; C. N. 1717. [II. 85; III. 383.]

1639. The undertenant is held towards the principal lessor for the amount only of the rent which he may owe at the time of seizure;—He cannot set up payments made in advance; —Payments made by the undertenant, either in virtue of a stipulation in the lease, or in accordance with the usage of the place, are not deemed to be made in advance.—ff. L. 11, § 5, de pign. act.; C. P. 162; Poth. Pand. l. 20, t. 2, n. 8; Tr. Louage, n. 538, 540; C. N. 1753. [II. 87.]

1640. The lessee has a right to remove, before the expiration of the lease, the improvements and additions which he has made to the thing leased, provided he leaves it in the state in which he has received it; nevertheless if the improvements or additions be incorporated with the thing leased, with nails, lime, or cement, the lessor may retain them on paying the value.—ff. L. 19, § 4, loc. cond.; Poth. Louage, n. 131; 2 Bour. 50, n. 9; C. L. 2694; C. 380, 413, 417. [II. 87.]

1641. The lessee has a right of action in the ordinary course of law, or by summary proceeding as provided in the Code of Civil Procedure:

1. To compel the lessor to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of such lessor; or, if the lessee so declare his option, to obtain the rescission of the lease in default of such repairs or ameliorations being made;

2. To rescind the lease for failure on the part of the lessor to perform any other of the obligations arising from the lease or devolving upon him by law;

3. To recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee. —ff. L. 25, § 2, loc. cond.; Dom. l. 1, t. 4, s. 3, n. 1; Poth. Louage, n. 67, 68, 72, 73, 108, 325; 2 Bour. 53, n. 7; Boulanget vs. Doutre, 4 L. C. R. 170; C. S. L. C. c. 40, s. 2. [II. 87.]

SECTION IV.

Rules particular to the lease or hire of houses

1642. The lease or hire of a house or part of a house, when no time is specified for its duration, is held to be annual, terminating on the first day of May of each year, when the rent is at so much a year; —For a month, when it is at so much a month;—For a day, when it is at so much a day.— If the rate of the rent for a certain time be not shewn, the duration of the lease is regulated by the usage of the place. —Poth. Louage, n. 30; Guy. Bail, 16; Tr. Louage, n. 604, 605; C. N. 1758; C. 1608. [II. 87.]

1643. The lease of moveables for furnishing a house or apartments, when no time is indicated for its duration, is governed by the rules contained

in the last preceding article, and when these do not apply, is deemed to be made for the usual duration of leases of houses or apartments, according to the usage of the place.—Poth. Louage, n. 30; Guy. Bail, 16; Tr. Louage, n. 604, 605; C. N. 1757. [II. 87.]

1644. The cleansing of wells and of the vaults of privies is at the charge of the lessor, if there be no stipulation to the contrary.—Poth. Louage, n. 222; Guy. Bail, 28; Tr. Louage, n. 574; C. N. 1756. [II. 87.]

1645. The rules contained in this chapter, relating to houses, extend also to warehouses, shops and manufactories, and to all immoveable property other than farms and rural estates, in so far as they can be made to apply. [II. 89.]

SECTION V.

Rules particular to the lease and hire of farms and rural estates.

1646. He who cultivates land on condition of sharing the produce with the lessor can neither sublet nor assign his lease, unless the right to do so has been expressly stipulated.—If he sublet or assign, without such stipulation, the lessor may eject him, and recover damages resulting from the violation of the lease.—ff. Arg. ex L. 19 et L. 20, pro soc.; L. 47, § ult., de reg. ju.; Tr. Louage, n. 643; Hudon vs. Hudon et al, 2 L. C. R. 30 and authorities cited; C. 1624; C. N. 1763, 1764. [II. 89.]

1647. The lessee is obliged to furnish the farm with sufficient stock and the implements necessary for its cultivation, and to cultivate it with reasonable care and skill.—ff. L. 25, § 3, loc. cond.; Poth. Louage, n. 190, 204; 2 Bour. 43, n. 1-3; C. N. 1766. [II. 89.]

1648. If the farm be found to contain a greater or less quantity than that specified in the lease, the rights of the parties to an increase or diminution of the rent are governed by the rules on that subject contained in the title *Of Sale.*—ff. L. 2, loc. cond.; Inst. l. 3, t. 24, i. p.; Poth. Louage, n. 132; Tr. Louage, n. 652; C. 1501, 1502, 1503; C. N. 1765. [II. 89.]

1649. The lessee of a farm or rural estate is bound to give notice to the lessor, with reasonable diligence, of any encroachment made upon it; in default of so doing he is liable for all damages and expense.—ff. Arg. ex L. 11, § 2, loc. cond.; Poth. Louage, n. 191; C. 476; C. N. 1768. [II. 89.]

1650. If the lease be for one year only, and, during the year, the harvest be wholly or in great part lost by a fortuitous event or by irresistible force, the lessee is discharged from his obligation for the rent in proportion to such loss.—ff. L. 15, § 2, 4, 5, loc. cond.; Dom. l. 1, t. 4, s. 5, n. 4, 6; Poth. Louage, n. 153; 2 Bour. 44, n. 8, 9; C. C. V. 1256; C. N. 1770. [II. 89.]

1651. [If the lease be for a

term of two or more years, the lessee is not entitled to claim any reduction of rent in the case stated in the last preceding article.]—ff. L. 25, § 6; L. 15, § 4, loc. cond.; Cod. L. 8; L. 18, de loc. et cond.; Domat, l. 1, t. 4, s. 5, n. 7; Poth. Louage, n. 159-161; C. N. 1769; A. D. Bail, n. 100; Tr. Louage, n. 698; C. C. V. 1257. [II. 89.]

1652. When the loss happens after the harvest is separated from the land, the lessee is not entitled to any reduction of the rent payable in money. If the rent consist of a share in the harvest, the lessor must bear his proportion of the loss, unless the loss is caused by the fault of the lessee, or he be in default of delivering such share.—ff. l. c.; Poth. Louage, n. 155; Guy. Bail, 34; C. N. 1771. [II. 91.]

1653. The lease of a farm or rural estate, when no term is specified, is presumed to be an annual lease, terminating on the first day of October of each year, subject to notice as hereinafter provided.—ff. Arg. ex L. 13, § 11, loc. cond.; Poth. Louage, n. 28; C. N. 1774. [II. 91.]

1654. The lessee of a farm or rural estate must leave, at the termination of his lease, the manure, and the straw and other substances intended for manure, if he have received them on taking possession; if he have not so received them, the owner may nevertheless retain them on paying their value.—Poth. Louage, n. 190; 2 Bour. 43, n. 4; Guy. Bail, 24, 25; C. C. V. 1263; C. 379; C. N. 1778. [II. 91.]

SECTION VI.

OF THE TERMINATION OF THE LEASE OR HIRE OF THINGS.

1655. The contract of lease or hire of things is terminated in the manner common to obligations, as declared in the eighth chapter of the title *Of Obligations*, in so far as the rules therein contained can be applied, and subject to the special rules contained in this title. [II. 91.]

1656. It is also terminated by rescission in the manner and for the causes declared in articles 1624 and 1641, and also in cases of insolvency of traders as provided in *The Insolvent Act of* 1864. [II. 91; III. 383.]

1657. When the term of a lease is uncertain, or the lease is verbal, or presumed as provided in article 1608, neither of the parties can terminate it without giving notice to the other, with a delay of three months, if the rent be payable at terms of three or more months; if the rent be payable at terms of less than three months, the delay is to be regulated according to article 1642.—The whole nevertheless subject to that article and to articles 1608 and 1653.—Poth. Louage, n. 29; Guy. Bail, 15; C. N. 1736. [II. 91.]

1658. The lease, if written, terminates of course, and without notice, at the expiration of the term agreed upon.—Cod.

by water are subject, with respect to the safe-keeping of things entrusted to them, to the same obligations and duties as innkeepers, declared under the title *Of Deposit*.—ff. L. 1, l. p. & § 1-4, naut. caup. stab.; Dom. l. 1, t. 4, s. 8, n. 5; C. N. 1782. [II. 95.]

1673. They are obliged to receive and convey, at the times fixed by public notice, all persons applying for passage, if the conveyance of passengers be a part of their accustomed business, and all goods offered for transportation; unless, in either case, there is a reasonable and sufficient cause of refusal.—C. S. C. c. 66, s. 96-98, 119, 120; Guy. Voiturier, 634; De Vil. D. C. C. Voiture, n. 3; Sm. M. L. 288; Sto. Bts. § 508; Ba. Ab. Carriers, B. [II. 97.]

1674. They are liable, not only for what has been received in the carriage or vessel, but also for what has been delivered to them at the port or place of deposit, to be put in their carriage or vessel.—ff. L. 1, § 8, naut. caup.; Dom. l. c.; C. N. 1783. [II. 97.]

1675. They are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.—Merl. Messageries, § 11, n. 2, for arrêts; C. 1071, 1072; Huston vs. G. T. Railway, 3 L. C. J. 269; C. N. 1784; C. Co. 103. [II. 97.]

1676. Notice by carriers, of special conditions limiting their liability, is binding only upon persons to whom it is made known; and notwithstanding such notice and the knowledge thereof, carriers are liable whenever it is proved that the damage is caused by their fault or the fault of those for whom they are responsible.—2 Tr. Louage, n. 942; 2 Par. n. 542, p. 449; Sto. Bts. § 554 & n. 3; 1 Bell, Com. § 104, 4th ed.; Sm. M. L. 489, 490; Huston vs. G. T. R. Co. cit. sup. [II. 97.]

1677. They are not liable for large sums of money or of bills or other securities, or for gold, or silver, or precious stones, or other articles of an extraordinary value, contained in any package received for transportation, unless it is declared that the package contains such money or other articles.—The foregoing rule nevertheless does not apply to the personal baggage of travellers when the money or the value of the articles lost is only of a moderate amount and suitable to the circumstances of the traveller, and the traveller is entitled to be examined upon oath in proof of the value of the things composing such baggage. — Fer. D. Aubergiste, 144; 1 Aug. 562; N. D. Aubergiste, § 3, n. 3; 6 Marc. 532; 6 Boi. 173-5; 11 Toul. n. 255; 2 Duv. 329; Sto. Bts, § 530; Sm. M. L. 489, 490; McDougal vs. Allan et al, 12 L. C. R. 321; Cadwallader vs. G. T. R. Co., 9 L. C. R. 169; McDougal vs. Torrance, 4 L. C. J. 132. [II. 97.]

1678. If by reason of a fortuitous event, or irresistible force, the transportation and delivery of the thing be not made within the stipulated term, the carrier is not liable in damages for the delay.—ff. L. 58, § 1, loc. cond.; Dom. l. 1, t. 4, s. 9, n. 5; C. Co. 104. [II. 97.]

1679. The carrier has a right to retain the thing transported until he is paid for the carriage or freight of it.—ff. L. 6, § 1, 2, q. pot.; Dom. l. 3, t. 1, s. 5, n. 11; Sm. M. L. 568-9; Brewster et al. vs. Hooker et al, 1 L. C. J. 90; C. N. 2102. [II. 97.]

1680. The reception of the thing transported and payment of the carriage or freight, without protest, extinguish all right of action against the carrier; unless the loss or damage is such that it could not then be known, in which case the claim must be made without delay after the loss or damage becomes known to the claimant. —2 Par. n. 547, 554; C. Co. 105. [II. 97.]

1681. The conveyance of persons and things by railway is subject to certain special rules, provided in the *Act respecting Railways*.—C. S. C. c. 66, s. 68, 96-102, 119, 120; C. N. 1786. [II. 99.]

1682. Special rules relating to the contract of affreightment and the conveyance of passengers in merchant vessels are contained in the fourth book.—C. N, 1786. [II. 99; III. 383.]

SECTION IV.

Of work by estimate and contract.

1683. When a party undertakes the construction of a building or other work by estimate and contract, it may be agreed, either that he shall furnish labor and skill only, or that he shall also furnish materials.—Dom. l. 1, t. 4, s. 7, n. 2; Poth. Louage, n. 393, 394; C. L. 2728; C. N. 1787. [II. 99.]

1684. If the workman furnish the materials, and the work is to be perfected and delivered as a whole, at a fixed price, the loss of the thing, in any manner whatsoever, before delivery, falls upon himself, unless the loss is caused by the fault of the owner or he is in default of receiving the thing. —ff. L. 2, § 1; L. 36, loc. cond.; L. 20; L. 65, de cont. empt.; Dom. l. 1, t. 4, s. 8, n. 8-10; Poth. Louage, n. 425, 426, 436, 394, & pt. 7, c. 3, al. 4, 5; Guy. Louage, 47; 6 Marc. 355, 356; Tr. Louage, n. 976 --; 19 Duv. 336, 337; C. N. 1788. [II. 99.]

1685. If the workman furnish only labor and skill, the loss of the thing before delivery does not fall upon him, unless it is caused by his fault.—ff. L. 13, § 5; L. 62, loc. cond.; Dom. l. 1, t. 4, s. 8, n. 4; Poth. Louage, n. 428, 434, 435, 500; C. L. 2730; C. N. 1789. [II. 99.]

1686. In the case of the last preceding article, if the work is to be perfected and delivered as a whole, and the thing perish before the work has been re-

by water are subject, with respect to the safe-keeping of things entrusted to them, to the same obligations and duties as innkeepers, declared under the title *Of Deposit*.—ff. L. 1, l. p. & § 1-4, naut. caup. stab.; Dom. l. 1, t. 4, s. 8, n. 5; C. N. 1782. [II. 95.]

1673. They are obliged to receive and convey, at the times fixed by public notice, all persons applying for passage, if the conveyance of passengers be a part of their accustomed business, and all goods offered for transportation; unless, in either case, there is a reasonable and sufficient cause of refusal.—C. S. C. c. 66, s. 96-98, 119, 120; Guy. Voiturier, 634; De Vil. D. C. C. Voiture, n. 3; Sm. M. L. 288; Sto. Bts. § 508; Ba. Ab. Carriers, B. [II. 97.]

1674. They are liable, not only for what has been received in the carriage or vessel, but also for what has been delivered to them at the port or place of deposit, to be put in their carriage or vessel.—ff. L. 1, § 8, naut. caup.; Dom. l. c.; C. N. 1783. [II. 97.]

1675. They are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.—Merl. Messageries, § 11, n. 2, for arrêts; C. 1071, 1072; Huston vs. G. T. Railway, 3 L. C. J. 269; C. N. 1784; C. Co. 103. [II. 97.]

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1677. They are not liable for large sums of money or of bills or other securities, or for gold, or silver, or precious stones, or other articles of an extraordinary value, contained in any package received for transportation, unless it is declared that the package contains such money or other articles.—The foregoing rule nevertheless does not apply to the personal baggage of travellers when the money or the value of the articles lost is only of a moderate amount and suitable to the circumstances of the traveller, and the traveller is entitled to be examined upon oath in proof of the value of the things composing such baggage. — Fer. D. Aubergiste, 144; 1 Aug. 562; N. D. Aubergiste, § 3, n. 3; 6 Marc. 532; 6 Boi. 173-5; 11 Toul. n. 255; 2 Duv. 329; Sto. Bts, § 530; Sm. M. L. 489, 490; McDougal vs. Allan et al, 12 L. C. R. 321; Cadwallader vs. G. T. R. Co., 9 L. C. R. 169; McDougal vs. Torrance, 4 L. C. J. 132. [II. 97.]

1678. If by reason of a fortuitous event, or irresistible force, the transportation and delivery of the thing be not made within the stipulated term, the carrier is not liable in damages for the delay.—ff. L. 58, § 1, loc. cond.; Dom. l. 1, t. 4, s. 9, n. 5; C. Co. 104. [II. 97.]

1679. The carrier has a right to retain the thing transported until he is paid for the carriage or freight of it.—ff. L. 6, § 1, 2, q. pot.; Dom. l. 3, t. 1, s. 5, n. 11; Sm. M. L. 568-9; Brewster et al. vs. Hooker et al, 1 L. C. J. 90; C. N. 2102. [II. 97.]

1680. The reception of the thing transported and payment of the carriage or freight, without protest, extinguish all right of action against the carrier; unless the loss or damage is such that it could not then be known, in which case the claim must be made without delay after the loss or damage becomes known to the claimant. —2 Par. n. 547, 554; C. Co. 105. [II. 97.]

1681. The conveyance of persons and things by railway is subject to certain special rules, provided in the *Act respecting Railways*.—C. S. C. c. 66, s. 68, 96-102, 119, 120; C. N. 1786. [II. 99.]

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SECTION IV.

Of work by estimate and contract.

1683. When a party undertakes the construction of a building or other work by estimate and contract, it may be agreed, either that he shall furnish labor and skill only, or that he shall also furnish materials.—Dom. l. 1, t. 4, s. 7, n. 2; Poth. Louage, n. 393, 394; C. L. 2728; C. N. 1787. [II. 99.]

1684. If the workman furnish the materials, and the work is to be perfected and delivered as a whole, at a fixed price, the loss of the thing, in any manner whatsoever, before delivery, falls upon himself, unless the loss is caused by the fault of the owner or he is in default of receiving the thing. —ff. L. 2, § 1; L. 36, loc. cond.; L. 20; L. 65, de cont. empt.; Dom. l. 1, t. 4, s. 8, n. 8-10; Poth. Louage, n. 425, 426, 436, 394, & pt. 7, c. 3, al. 4, 5; Guy. Louage, 47; 6 Marc. 355, 356; Tr. Louage, n. 976 --; 19 Duv. 336, 337; C. N. 1788. [II. 99.]

1685. If the workman furnish only labor and skill, the loss of the thing before delivery does not fall upon him, unless it is caused by his fault.—ff. L. 13, § 5; L. 62, loc. cond.; Dom. l. 1, t. 4, s. 8, n. 4; Poth. Louage, n. 428, 434, 435, 500; C. L. 2730; C. N. 1789. [II. 99.]

1686. In the case of the last preceding article, if the work is to be perfected and delivered as a whole, and the thing perish before the work has been re-

ceived, and without the owner being in default of receiving it, the workman cannot claim his wages, although he be without fault; unless the thing has perished by reason of defect in the materials, or by the fault of the owner.—ff. L. 61, § 1; L. 38, i. p. & § 1, loc. cond.; Dom. l. 1, t. 4, s. 9, n. 4; Poth. Louage, n. 433, 434; Tr. Louage, n. 971-978; 6 Marc. 537; C. C. V. 1275; C. N. 1790. [II. 99.]

1687. If the work be composed of several parts, or done at a certain rate by measurement, it may be received in parts. It is presumed to have been so received, for all the parts paid for, if the owner pays the workman in proportion to the work done.—Poth. Lou. n. 436, 437; C. L. 2732; C. N. 1791; C. C. V. 1276; Auth. under three pre. arts. [II. 99.]

1688. If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavorable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss.—Cod. L. 8, de op. pub.; Poth. Louage, n. 425. 426, Ob. n. 163; Fer. on 113, C. P.; Bour. l. 6, t. 2, c. 9, n. 8; C. 2259; Brown & Laurie, 5 L. C. R. 65, and cit.; C. N. 1792, 2270. [II.99.]

1689. If, in the case stated in the last preceding article, the architect do not superintend the work, he is liable for the loss only which is occasioned by defect or error in the plan furnished by him.—19 Duv. n. 354. [II. 99.]

1690. [When an architect or builder undertakes the construction of a building or other works by contract, upon a plan and specifications, at a fixed price, he cannot claim any additional sum upon the ground of a change from the plan and specifications, or of an increase in the labor and materials, unless such change or increase is authorized in writing, and the price of them is agreed upon with the proprietor. — Poth. Lou. n. 407, 408; N. D. Dévis et Marché, 364; Tr. Louage; n. 1016-1019; 6 Marc. 542; 6 Boi. 193 & arr. cit.; 19 Duv. 366; C. N. 1793. [II. 101.]

1691. The owner may cancel the contract for the construction of a building or other works at a fixed price, although the work have been begun, on indemnifying the workman for all his actual expenses and labor, and paying damages according to the circumstances of the case.—Poth. Lou. n. 440-2-4; Guy. Lou. 48; C. L. 2736; C. N. 1794. [II. 101.]

1692. The contract of lease or hire of work by estimate and contract is not terminated by the death of the workman; his legal representatives are bound to perform it.—But in cases wherein the skill and ability of the workman were an inducement for making the contract, it may be cancelled at his death by the party hiring him.—Poth. Louage, n. 423, 453-455; Guy. Louage, 48; C.L, 2737; C. N. 1795. [II.101.]

1693. In the latter case stated in the last preceding article the owner is bound to pay

to the legal representatives of the workman, in proportion to the price agreed upon in the contract, the value of the work done and materials furnished, in case such work and materials are useful to him.—Poth. Lou. n. 456; C. N. 1796. [II. 101.]

1694. The contract is not terminated by the death of the party hiring the work, unless the performance of it becomes thereby impossible. — Poth. Lou. n. 444; C. N. 1742. [II. 101.]

1695. Architects, builders and other workmen, have a privilege upon the buildings, or other works constructed by them, for the payment of their work and materials, subject to the rules contained in the title *Of Privileges and Hypothecs*, andthe title *Of Registration of Real Rights*.—C. S. L. C. c. 37, s. 26. § 4; C. N. 2103. [II.101.]

1696. Masons, carpenters, and other workmen, who undertake work by contract, for a fixed price, are subject to the rules prescribed in this section. They are regarded as contractors with respect to such work.—Tr. Louage, n. 1053; 4 Fen. 212; C. L. 2742; C. C. V. 1283; C. N. 1799. [II. 101.]

1697. The workmen who are employed by the contractor in the construction of a building or other works have no direct action against the owner. —Guy. Ouvrier, 470; Bridgman vs. Ostell, 9 L. C. R. 445; C. N. 1798. [II. 101.]

CHAPTER FOURTH.

OF THE LEASE OF CATTLE ON SHARES.

1698. The letting out of cattle on shares is a contract by which one of the parties delivers to the other a stock of cattle to keep, feed, and take care of, upon certain conditions as to the division of profits between them.—Cod. L. 8, De pac.; Poth. Chep. n. 6; 2 Arg. 296; C. N. 1800. [II. 103.]

1699. Every kind of animal which is susceptible of increase or profit, in agriculture or commerce, may be the object of this contract.—Dom. l. 1, t. 4, s. 1, n. 2; Poth. Chep. n. 21-23; C. N. 1802. [II. 103.]

1700. If there be no special agreement the contract is regulated by the usage of the place where the cattle are kept.—C. N. 1803. [II. 103.]

TITLE EIGHTH.

OF MANDATE.

CHAPTER FIRST.

GENERAL PROVISIONS.

1701. Mandate is a contract by which a person, called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it.—The

acceptance may be implied from the acts of the mandatary, and in some cases from his silence.—ff. L. 1, De proc., L. 1, Mand.; Poth. Mand. 1, 31-33; Dom. l. 1, t. 15, s. 1, § 1-3; Tr. Mand. n. 5 --, 146, 148, 149; Halifax, A. C. L. 70; Sto. Bts. 137; C. L. 2958; C. N. 1794, 1795. [III. 81.]

1702. Mandate is gratuitous unless there is an agreement or an established usage to the contrary.—ff. L. 1, § 4, L. 6, mand.; Inst. 13, de mand.; Poth. Mand. n. 22, 23, 26; Dom. l. c. § 9, and s. 3, § 8, 9; Tr. Mand. 249-251; C. N. 1986. [III. 81.]

1703. The mandate may be either special, for a particular business, or general, for all the affairs of the mandator. —When general it includes only acts of administration.—For the purpose of alienation and hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express.—ff. L, 1, § 1, de proc. L. 16, L. 60, L. 63, c. t.; Poth. Mand. n. 123, 144, 159, 160; Dom. l. c. s. 1, § 6-8, s. 3, § 3, 10; Tr. Mand. n. 276, 278, 286; C. N. 1987, 1988. [III. 81.]

1704. The mandatary can do nothing beyond the authority given or implied by the mandate. He may do all acts which are incidental to such authority and necessary for the execution of the mandate. —ff. L. 56, de proc.; Dom. l. c. s. 3, § 3, 10; Tr. Mand. 285, 319; C. N. 1989. [III. 81.]

1705. Powers granted to persons of a certain profession or calling to do any thing in the ordinary course of the business which they follow, need not be specified; they are inferred from the nature of such profession or calling. —Sto. Ag. § 127-133, 228; Pa. P. & A. 194, 200, 201; C. L. 2969. [III. 81.]

1706. An agent employed to buy or sell a thing cannot be the buyer or seller of it on his own account.—ff. L. 34, § 7, de contr. emp.; Sto. Ag. n. 213; Sm. M. L. 121; C. 1484; C. N. 1596. [III. 81.]

1707. Emancipated minors may be mandataries, but in such cases the action of the mandator against the minor is subject to the general rules relating to the obligations of minors.—ff. L. 3, § 11, L. 4, de min.; Tr. Mand. n. 330, 332-335; C. N. 1990. [III. 81.]

1708. A married woman, who executes a mandate given to her, binds the mandator, but no action can be brought against her otherwise than as provided in the title *Of Marriage*.—Poth. P. Mar. n. 49; Tr. Mand. n. 330, 332-335; C. 183; C. N. 1990. [III. 81,]

CHAPTER SECOND.

OF THE OBLIGATIONS OF THE MANDATARY.

SECTION I.

Of the obligations of the mandatary toward the mandator.

1709. The mandatary is obliged to execute the mandate which he has accepted, and he is liable for damages resulting

from his non-execution of it while his authority continues. —He is obliged, after the extinction of the mandate, to do whatever is a necessary consequence of acts done before, and if the extinction be by the death of the mandator, he is obliged to complete business which is urgent and cannot be delayed without risk of loss or injury.—ff. L. 22, § 11, L. 5, L. 8, § 10, mand.; Inst. § 11, de mand.; Poth. Mand. n. 38, 107; Ersk. Inst. b. 3, t. 3, n. 41, p. 704; Sto. Bts. n. 204; Tr. Mand. n. 382, 383; C. L. 2971; C. N. 1991. [III. 83.]

1710. The mandatary is bound to exercise, in the execution of the mandate, reasonable skill and all the care of a prudent administrator. — Nevertheless, if the mandate be gratuitous, the court may moderate the rigor of the liability arising from his negligence or fault, according to the circumstances.—ff. L. 10, L. 12, § 10, mand.; Cod. L. 13, mand.; Poth. Mand. n. 46; C. 1045; Dom. l. 1, t. 15, s. 3, § 4, 5; Tr. Mand. n. 393; Jones, Bts. 61, 62, 114; Pa. P. & A. 6; Ersk. Inst. b. 3, t. 3, § 36, p. 699; C. L. 2972; C. N. 1992. [III. 83.]

1711. The mandatary is answerable for the person whom he substitutes in the execution of the mandate, when he is not empowered to do so; and if the mandator be injured by reason of the substitution he may repudiate the acts of the substitute.—The mandatary is answerable in like manner when he is empowered to substitute, without designation of the person to be substituted, and he appoints one who is notoriously unfit.—In all these cases the mandator has a direct action against the person substituted by the mandatary. —ff. L. 8, § 3, mand. L. 21, § 3, de neg. gest; Poth. Mand. n. 99; Lac. Procureur, 521; Tr. Mand. n. 447-449; C. L. 2296, 2979, 2978; C. N. 1994. [III. 83.]

1712. When several mandataries are appointed together for the same business, they are jointly and severally liable for each other's acts of administration, unless it is otherwise stipulated.—ff. L. 60, § 2, mand.; Dom. l. 1, t. 15, s. 3, n. 13; Poth. Mand. n. 63; Ersk. Inst. b. 3, t. 3, § 34; Sto. Ag. § 44, Bts. § 195; Jones, Bts., 51, 52; C. N. 1995; Tr. n. 489-7. [III. 83.]

1713. The mandatary is bound to render an account of his administration, and to deliver and pay over all that he has received under the authority of the mandate, even if it were not due; subject nevertheless to his right to deduct therefrom the amount of his disbursements and charges in the execution of the mandate.—If he have received a determinate thing he is entitled to retain it until such disbursements and charges are paid.—ff. L. 20, L. 10, § 8, mand.; Poth. Mand. n. 51, 58, 59; Dom. l. c. n. 8; Tr. Mand. n. 698, 699 --; Pa. P. & A. 124, 125, 127; Sto. Bts., § 173; C. N. 1993; C. 1723. [III. 83.]

1714. He is bound to pay interest upon the money of the

mandator which he employs for his own use, from the day of so employing it, and upon any remainder due to the mandator, from the time of being put in default.—ff. L. 10, § 3, mand.; Poth. Mand. n. 51, 56; C. N. 1996. [III. 85.]

SECTION II.

Of the obligations of the mandatary toward third persons.

1715. The mandatary acting in the name of the mandator and within the bounds of the mandate is not personally liable to third persons with whom he contracts, except in the case of factors hereinafter specified in article 1738, and in the cases of contracts made by the master of a ship for her use.—ff. L. 20, de inst. act.; Poth. Mand. n. 87; Dom. l. 1, t. 16, s. 3, n. 8; Tr. Mand. n. 510; Sto. Ag. 263; Pa. P. & A. 368; C. N. 1997. [III. 85.]

1716. A mandatary who acts in his own name is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator also.—Poth. Mand. n. 88; Pa. P. & A. 361, 372; Sto. Ag. 163, 266, 269; Tr. Mand. n. 522 --. [III. 85.]

1717. He is liable in like manner when he exceeds his powers under the mandate, unless he has given the party with whom he contracts sufficient communication of such powers.—C. L. 2981; Sto. Ag. 264, 265; Tr. Mand. 591, 592; C. N. 1997. [III. 85.]

1718. He is not held to have exceeded his powers when he executes the mandate in a manner more advantageous to the mandator than that specified by the latter.—ff. L. 5, § 5, mand.; Poth. Mand. n. 92; Tr. Mand. n. 403; C. L. 2980. [III. 85.]

1719. He is held to have exceeded his powers, when he does alone any thing which, by the mandate, he is charged with doing conjointly with another.—ff. L. 5, mand. L. 11, § 5, de inst. act.; Poth. Mand. n. 99; Dom. l. 1, t. 15, s. 3, n. 14; Sto. Ag. § 42, 43. [III. 85.]

CHAPTER THIRD.

OF THE OBLIGATIONS OF THE MANDATOR.

SECTION I.

Of the obligations of the mandator toward the mandatary.

1720. The mandator is bound to indemnify the mandatary for all obligations contracted by him toward third persons, within the limit of his powers; and for acts exceeding such powers, whenever they have been expressly or tacitly ratified.—ff. L. 45, i. p., § 5, mand.; Dom. l. 5, t. 15, s. 2, n. 1; Poth. Mand. n. 80-82; Sto. Bts. § 196, 198; C. N. 1998. [III. 85.]

1721. The mandator or his legal representative is bound to indemnify the mandatary for all acts done by him within the limit of his powers, after the extinction of the

mandate by death or other cause, when he is ignorant of such extinction.—Poth. Mand. n. 106; C. 1728, 1670. [III. 85.]

1722. The mandator is bound to reimburse the expenses and charges which the mandatary has incurred in the execution of the mandate, and to pay him the salary or other compensation to which he may be entitled.—When there is no fault imputable to the mandatary, the mandator is not released from such reimbursement and payment, although the business has not been successfully accomplished; nor can he reduce the amount of the reimbursement upon the ground that the expenses and charges might have been made less by himself.—ff. L. 12, § 9, L. 27, § 4; L. 56, § 4, mand.; Poth. Mand. n. 68, 69, 78, 79; Dom. l. 1, t. 15, s. 2, n. 2, 3; 2 Par. n. 489, 571; C. Co. 93, 94; C. N. 1999. [III. 87.]

1723. The mandatary has a privilege and right of preference for the payment of the expenses and charges mentioned in the last preceding article, upon the things placed in his hands and upon the proceeds of the sale or disposal thereof.—C. 1713; C. Co. 93, 94. [III. 87.]

1724. The mandator is obliged to pay interest upon money advanced by the mandatary in the execution of the mandate. The interest is computed from the day on which the money is advanced.—ff. L. 12, § 9, mand.; Dom. l. c. n. 4; Tr. Mand. n. 274, 275 --; C. N. 2001. [III. 87.]

1725. The mandator is obliged to indemnify the mandatary who is not in fault, for losses caused to him by the execution of the mandate.—ff. L. 20, L. 29, § 6, mand.; Poth. Mand. 75, 76; Dom. l. 1, t. 15, s. 2, n. 6; Sto. Bts., § 200, 201, Ag. 341; Tr. Mand. n. 655 --; C. N. 2000. [III. 87.]

1726. If a mandate be given by several persons, their obligations toward the mandatary are joint and several.—ff. L. 59, § 3, mand.; Poth. Mand. n. 82; Dom. l. c. n. 5; Ersk. Inst. b. 3, t. 3, § 38; C. N. 2002. [III. 87.]

SECTION II.

Of the obligations of the mandator toward third persons.

1727. The mandator is bound in favor of third persons for all the acts of his mandatary, done in execution and within the powers of the mandate, except in the case provided for in article 1738 of this title, and the cases wherein by agreement or the usage of trade the latter alone is bound.—The mandator is also answerable for acts which exceed such power, if he have ratified them either expressly or tacitly.—Poth. Ob. n. 75, 77 --, 447, 448, Mand. n. 87, 88, 89; Dom. l. 1, t. 15, s. 2, n. 1; 18 Dur. 260, 261; Tr. Mand. n. 511 --, 516, 517; 522, 535, 536; Sto. Ag. § 442, 444, 445, 446, 448; 1 Bell, Com. § 418, p. 396, 399; Pa. P. & A. 247, 248; C. N. 1998. [III. 87.]

1728. The mandator or his legal representative is bound

toward third persons for all acts of the mandatary, done in execution and within the powers of the mandate after it has been extinguished, if its extinction be not known to such third persons. — Poth. Mand. 106; Dom. l. 1, t. 15, s. 4, n. 1, 7; Ersk. Inst. b. 3, t. 3, § 41; C. N. 2009. [III. 87.]

1729. The mandator or his legal representative is bound for acts of the mandatary done in execution and within the powers of the mandate after its extinction, when such acts are a necessary consequence of a business already begun.—He is also bound for acts of the mandatary done after the extinction of the mandate by death or cessation of authority in the mandator, for the completion of a business, where loss or injury might have been caused by delay.—Poth. Mand. 106, 107, 111, 121; Dom. l. c. n. 7; Ersk. Inst. l. c.; 1 Bell. Com. § 413, p. 396; C. 1709, [III. 89.]

1730. The mandator is liable to third parties who in good faith contract with a person not his mandatary, under the belief that he is so, when the mandator has given reasonable cause for such belief.—1 Bell, Com. 411, 412; Pa. P. A. 162 --; Sto. Ag. 443. [III. 89.]

1731. He is liable for damages caused by the fault of the mandatary, according to the rules declared in article 1054. —Poth. Ob. n. 453; 1 Bell, Com. § 418, p. 400; Sto. Ag. § 452. [III. 89.]

CHAPTER FOURTH.

OF ADVOCATES, ATTORNEYS AND NOTARIES.

1732. Advocates, attorneys and notaries are subject to the general rules contained in this title, in so far as they can be made to apply. The profession of advocate and attorney is regulated by the provisions contained in an act intituled: *An Act respecting the Bar of Lower Canada*, and that of notary by an act intituled: *An Act respecting the Notarial Profession.* —C. S. L. C. c. 72; Ib. c. 73; C. S. C. c. 75. [III. 89.]

1733. The rules concerning the duties and rights of advocates and attorneys, in the exercise of their functions before the several courts of Lower Canada, are contained in the Code of Civil Procedure, and in the rules of practice of such courts respectively.—[III. 89.]

1734. The rules of prescription relating to advocates, attorneys and notaries are contained in article 2260. [III. 89.]

CHAPTER FIFTH.

OF BROKERS, FACTORS AND OTHER COMMERCIAL AGENTS.

1735. A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions.—He may be the mandatary of both parties and bind both by his acts in the business for which he is engaged by them.—ff. L. 3, de prox.; Dom. l. 1, t. 17, s. 1, n. 1; C. Co. 74; C. L. 2985; Sto. Ag. § 28;

Sm. M. L. 507, 508; Syme et al. vs. Heward, 1 L. C. R. 19. [III. 89.]

1736. A factor or commission-merchant is an agent who is employed to buy or sell goods for another, either in his own name or in the name of his principal, for which he receives a compensation commonly called a commission.—3 Chit. Co. L. 193, 194; Sto. Ag. § 33; 2 Par. 404-413; 1 Bell, Com., 408, 409; Ersk. Inst. b. 3, t. 3, § 34. [III. 89.]

1737. Brokers and factors are subject to the general rules declared in this title, when these are not inconsistent with the articles of this chapter. [III. 91.]

1738. A factor whose principal resides in another country is personally liable to third persons with whom he contracts, whether the name of the principal be known or not. The principal is not liable on such contracts to the third parties, unless it is proved that the credit was given to both principal and factor, or to the principal alone.—Pa. P. & A. 248, 273, 282; Sto. Ag. § 268, 290, 448; 2 Par. 404; Sm. M. L. 66. [III. 91.]

1739. Any person may contract for the purchase of goods with any agent entrusted with their possession or to whom the same have been consigned, and may receive the same from such agent and pay him the price thereof, and such contract and payment is binding upon the owner of the goods, notwithstanding the purchaser has notice that he is contracting only with an agent.—C. S. C. c. 59, s. 1. [III. 91.]

1740. Any agent entrusted with the possession of goods, or of the documents of title thereto, is deemed the owner thereof for the following purposes, that is to say:

1. To make a sale or contract, as mentioned in the last preceding article;

2. To entitle the consignee of goods consigned by such agent, to a lien thereon for any money or negotiable security advanced or given by him to or for the use of such agent, or received for him by such agent for the use of the consignee, in like manner as if such agent were the true owner of the goods;

3. To give validity to any contract or agreement, by way of pledge, lien or security, made in good faith with such agent, as well for an original loan, advance or payment made upon the security of the goods or documents, as for any other or continuing advance in respect thereof;

4. To make such contract binding upon the owner of the goods and on all other persons interested therein, notwithstanding the person claiming such pledge or lien had notice that he was contracting only with an agent.—C. S. C. c. 59, s. 2. [III. 91.]

1741. In case any person having a valid lien and security on any goods or documents of title or negotiable security, in respect of a previous advance upon a contract with an agent,

gives up the same to such agent, upon a contract for the pledge, lien or security of other goods, or of another document or security, by such agent delivered to him in exchange, to be held upon the same lien as the goods, document or security so given up, then, such new contract, if in good faith, is deemed a valid contract, made in consideration of a present advance in money, within the provisions of this chapter, but the lien acquired under such new contract, on the goods, document or security, deposited in exchange, cannot exceed the value of the goods, document or security, so delivered up and exchanged,—C. S. C. c. 59, s. 3. [III. 91.]

1742. Such contracts only are valid as are mentioned in this chapter, and such loans, advances and exchanges only are valid as are made in good faith and without notice that the agent making the same has no authority so to do, or that he is acting in bad faith against the owner of the goods.—C. S. C. c. 59, s. 4. [III. 91.]

1743. Loans, advances and exchanges in good faith, though made with notice of the agent not being the owner, but without notice of his acting without authority, bind the owner and all other persons interested in the goods, documents or security, as the case may be.—C. S. C. c. 59, s. 6. [III. 91.]

1744. No antecedent debt owed by an agent entrusted with the possession of goods or the documents of title thereto, can be the subject of any lien or pledge of such goods or documents, nor can the agent for any purpose relating to such goods deviate from the orders or authority received from his principal.—C. S. C. c. 59, s. 5. [III. 93.]

1745. Bills of lading, warehouse-keeper's or wharfinger's receipts or orders for delivery of goods, bills of inspection of potash or pearlash, and all other documents used in the ordinary course of business, as proof of the possession or control of goods, or purporting to authorize, either by endorsement or by delivery, the possessor of any such document to transfer or receive goods thereby represented, are deemed documents of title within the provisions of this chapter.—C. S. C. c. 59, s. 7. [III. 93.]

1746. Any agent possessed of any document of title, whether derived immediately from the owner of the goods, or obtained by reason of the agent having been entrusted with the possession of the goods, or of any document of title thereto, is deemed to be entrusted with the possession of the goods represented by such document of title.—C. S. C. c. 59, s. 8. [III. 93.]

1747. Any contract pledging or giving a lien upon any document of title, is deemed a pledge of and lien upon the goods to which it relates, and the agent is deemed the possessor of the goods or documents of title, whether the same be in his actual custody or be held by any other person for him or subject to his control.—

C. S. C. c. 59, s. 9. [III. 93.]

1748. When a loan or advance is made in good faith, to an agent entrusted with and in possession of goods or documents of title, on the faith of any contract in writing to consign, deposit, transfer or deliver such goods, or documents of title, and the same are actually received by the person making the loan or advance, either at the time of the contract or at a time subsequent thereto, without notice that the agent is not authorized to make the pledge or security, such loan or advance is deemed a loan or advance upon the security of the goods or documents of title within the provisions of this chapter.—C. S. C. c. 59, s. 10. [III. 93.]

1749. Every contract, whether made directly with the agent or with a clerk or other person on his behalf, is deemed a contract with such agent.—C. S. C. c. 69, s. 11. [III. 93.]

1750. Every payment, whether made by money, bill of exchange or other negotiable security, is deemed an advance within the provisions of this chapter.—C. S. C. c. 59, s. 12. [III. 93.]

1751. Every agent in possession of goods or documents as aforesaid is for the purposes of this chapter taken to be entrusted therewith by the owner, unless the contrary is shewn in evidence.—C. S. C. c. 59, s. 13. [III. 93.]

1752. Nothing contained in this chapter lessens or affects the civil responsibility of the agent for the breach of any obligation, or the non-fulfilment of his orders or authority.—C. S. C. c. 59, s. 14. [III. 93.]

1753. Notwithstanding any of the foregoing articles, the owner may redeem any goods or documents of title pledged as aforesaid, at any time before the same have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which the lien exists, and upon payment or satisfaction to the agent, of any sum of money for or in respect of which such agent is entitled to retain the goods or documents by way of lien against such owner; or he may recover from the person with whom any goods or documents have been pledged, or who has any lien thereon, any balance or sum of money remaining in his hands as the produce of the sale of the goods, after deducting the amount of the lien under the contract.—C. S. C. c. 59, s. 20. [III. 95.]

1754. In case of the bankruptcy of any agent, and in case the owner of the goods redeem the same, he is held, in respect of the sum paid by him on account of the agent for such redemption, to have paid the same for the use of such agent before his bankruptcy, or in case the goods have not been so redeemed, the owner is deemed a creditor of the agent for the value of the goods so pledged at the time of the pledge, and may in either case claim or set off the sum so paid, or the value of such goods, as the case may

be.—C. S. C. 59, s. 21. [III. 95.]

CHAPTER SIXTH.

OF THE TERMINATION OF MANDATE.

1755. Mandate terminates:

1. By revocation;

2. By the renunciation of the mandatary;

3. By the natural or civil death of the mandator or mandatary;

4. By interdiction, bankruptcy, or other change in the condition of either party by which his civil capacity is affected;

5. By the cessation of authority in the mandator;

6. By the accomplishment of the business or the expiration of the time for which the mandate is given;

7. By other causes of extinction common to obligations. —ff. L. 12, § 16, L. 22, § 11, L. 27, § 3, L. 26, i. p. mand.; Cod. L. 15, mand.; Poth. Mand. n. 38 --, 101, 103, 111-113, 120; Dom. l. 1, t. 15, s. 4; Tr. Mand. 744 --; Sto. Bts. §§ 202-211; Clam. 300 --, 332 --; C. 1138; C. N. 2003. [III. 95.]

1756. The mandator may at any time revoke the mandate, and oblige the mandatary to return to him the procuration, if it be an original instrument.—ff. L. 12, § 16, mand.; Poth. Mand. l. c.; Tr. Mand. 764 --; C. L. 2997; C. N. 2004. [III. 95.]

1757. The appointment of a new mandatary for the same business has the effect of a revocation of the first appointment from the day on which the former mandatary has been notified of the new appointment. —ff. L. 31, § fin., De proc.; Poth. Mand. 114 --; Dom. l. c. n. 2; C. L. 2999; Sto. Bts. § 208; C. N. 2006. [III. 95.]

1758. If notice of the revocation be given to the mandatary alone, it does not affect third persons who in ignorance of it have contracted with the mandatary, saving to the mandator his right against the latter.—Poth. Mand. 121; C. 1728; C. L. 2998; C. N. 2005. [III. 95.]

1759. The mandatary may renounce the mandate after acceptance, on giving due notice to the mandator. But if such renunciation be injurious to the latter, the mandatary is answerable in damages, unless there is a reasonable cause for the renunciation. If the mandatary be acting for a valuable consideration he is liable according to the general rules relating to the inexecution of obligations.—ff. L. 22, § 11; L. 5, § 1; L. 23; L. 24; L. 25, mand.; Poth. Mand. n. 38 --; Dom. l. c. n. 3-5; Tr. Mand. 806, 382; Sto. Ag. § 478; C. title *Of Obligations*, c. 6; C. N. 2007. [III. 95.]

1760. Acts of the mandatary, done in ignorance of the death of the mandator or other cause whereby the mandate is extinguished, are valid.—ff. L. 26, mand.; Poth. Mand. 106; Dom. l. c. n. 7; Tr. Mand. 811 --; Sto. Bts. § 204, 205; C. N. 2008; C. 1720, 1728. [III. 97.]

1761. The legal representatives of the mandatary, hav-

ing a knowledge of the mandate and not being incapacitated by minority or otherwise, are bound to give notice of his death to the mandator and to do, in business already begun, whatever is immediately necessary to protect the latter from loss.—ff. Arg. ex leg. 40, pro soc.; Poth. Mand. n. 101; Trop. Mand. 830, 835-837; Sto. Bts. 202; C. N. 2010. [III. 97.]

TITLE NINTH.

OF LOAN

GENERAL PROVISIONS.

1762. Loans are of two kinds:

1. The loan of things which may be used without being destroyed, called loan for use (*commodatum*);

2. The loan of things which are consumed by the use made of them, called loan for consumption (*mutuum*).—ff. L. 2, de reb. cred.; Jones, Bts. 74; Sto. Bts. § 219--; C. L. 2862; C. N. 1874. [III. 97.]

CHAPTER FIRST.

OF LOAN FOR USE (COMMODATUM.)

SECTION I.

General provisions.

1763. Loan for use is a contract by which one party, called the lender, gives to another, called the borrower, a thing to be used by the latter gratuitously for a time, and then to be returned by him to the former.—ff. L. 1, § 1; L. 3, § 4; L. 4; L. 5, § com.; Inst. l. 3, t. 15, § 2, i. f.; Poth. Prêt U. Intr. & c. 1, s. 1, a. 1; Tr. Prêt, 13--; Jones, l. c.; Sto. l. c.; C. L. 2864; C. N. 1875, 1876. [III. 97.]

1764. The lender continues to be the owner of the thing lent.—ff. L. 8; L. 9, commod.; Poth. Prêt U. 4; Tr. Prêt, 16; C. L. 2866; C. N. 1877. [III. 97.]

1765. Every thing may be loaned for use which may be the object of the contract of lease or hire.—C. 1605-6; Poth. Prêt. U. 11; C. N. 1878. [III. 99.]

SECTION II.

Of the obligations of the borrower

1766. [The borrower is bound to bestow the care of a prudent administrator in the safe-keeping and preservation of the thing loaned.]—He cannot apply the thing to any other use than that for which it is intended by its nature or by agreement.—Inst. l. 3, t. 15, § 2; ff. L. 1, § 4, de ob. et act, L. 5, § 2, 5, 7, 8, L. 18, com.; Poth. Prêt U. 48; C. N. 1880. [III. 99.]

1767. If the borrower apply the thing to any other use than that for which it is intended, or use it for a longer time than is agreed upon, he is liable for the loss of it arising even from a fortuitous event. —Author. under a. 1766; Poth. Prêt U. 58, 60; C. N. 1881. [III. 99.]

1768. If the thing lent be lost by a fortuitous event from which the borrower might have preserved it by using his own, or if being unable to save both things he prefer to save his own, he is liable for the loss.—ff. L. 5, § 4, com.; Cod. L. 1, de com.; Poth. Prêt U. 56; Sto. Bts. § 246-251; C. N. 1882. [III. 99.]

1769. If the thing deteriorate by the use alone for which it is lent and without fault on the part of the borrower, he is not liable for the deterioration. — ff. L. 10, i. p. L. 25, com.; Poth. Prêt U. 38, 39, 55, 69; C. N. 1884. [III. 99.]

1770. The borrower cannot retain the thing lent for a debt due to him by the lender, unless such debt is for expenses necessarily incurred in the preservation of the thing.—ff. L. 18, § 2, com.; Cod. L. 4, de com.; Poth. Prêt U. 43, 44, 82; Tr. Prêt, 128; Vin. Q. S. l. 1, c. 5; C. N. 1885. [III. 99.]

1771. If in order to use the thing the borrower have incurred expense, he is not entitled to recover it from the lender.— ff. L. 18, § 2, com; Poth. Prêt U. 81; C. N. 1886. [III. 99.]

1772. If several persons conjointly borrow the same thing, they are jointly and severally obliged toward the lender.—ff. L. 5, § 15, L. 21, § 1, com.; Poth. Prêt U. 65; C. N. 1887. [III. 99.]

SECTION III.

Of the obligations of the lender.

1773. The lender cannot take back the thing, or disturb the borrower in the proper use of it, until after the expiration of the term agreed upon, or, if there be no agreement, until after the thing has been used for the purpose for which it was borrowed; subject nevertheless to the exception declared in the next following article.— ff. L. 17, § 3, com.; Poth. Prêt U. 20, 24, 76, 78; C. N. 1888. [III. 99.]

1774. If before the expiration of the term, or, if no term have been agreed upon, before the borrower has completed his use of the thing, there occur to the lender a pressing and unforeseen need of it, the court may, according to the circumstances, oblige the borrower to restore it to him.—Poth. Prêt U. 25, 77; Tr. Prêt, 151; C. N. 1889. [III. 101.]

1775. If during the continuance of the loan the borrower be obliged, for the preservation of the thing lent, to incur any extraordinary and necessary expense, of so urgent a nature that he cannot notify the lender, the latter is bound to reimburse it to him.—ff. L. 18, § 2, com.; Poth. Prêt U. 81; C. N. 1890. [III. 101.]

1776. When the thing lent has defects which cause injury to the person using it, the len-

der is responsible if he knew the defects and did not make them known to the borrower.—ff. L. 18, § 3; L. 22, com.; Poth. Prêt U. 84; C. N. 1891. [III. 101.]

CHAPTER SECOND.

OF LOAN FOR CONSUMPTION (MUTUUM).

SECTION I.

General provisions.

1777. Loan for consumption is a contract by which the lender gives the borrower a certain quantity of things which are consumed by the use made of them, under the obligation by the latter to return a like quantity of things of the same kind and quality.—ff. L. 2, § 1, 2, de reb. cred.; Poth. Prêt C. 1; C. N. 1892. [III. 101.]

1778. By loan for consumption the borrower becomes owner of the thing lent, and the loss of it falls upon him.—ff. L. 2, § 2, de reb. cred.; L. 1, § 4, de oblig. et act; Poth. Prêt C. n. 1, 4, 5, 50; Pr. de la Jan. n. 537; C. N. 1893. [III. 101.]

1779. The obligation which results from a loan in money is for the numerical sum received.—If there be an increase or diminution in the value of the currency before the time of the payment, the borrower is obliged to return the numerical sum lent, and only that sum, in money current at the time of payment.—Poth. Prêt C. 35, 36, 37; C. N. 1895, 1896. [III. 101.]

1780. If the loan be in bullion or of provisions, the borrower is obliged to return the same quantity and quality as he has received and nothing more, whatever may be the increase or diminution of the price of them.—ff. L. 2; L. 3, de reb. cred.; Poth. Prêt C. 15; C. N. 1897. [III. 101.]

SECTION II.

Of the obligations of the lender.

1781. In making a loan for consumption the lender must have the right to alienate the thing loaned, and he is subject to the obligations declared in article 1776, relating to loan for use.—ff. L. 18, com.; L. 2, § 2, 4, de reb. cred.; Dom. l. 1, t. 6, s. 2, n. 2, 3; Poth. Prêt C. 51, 52; Tr. Prêt, 186, 187; C. N. 1898. [III. 101.]

SECTION III.

Of the obligations of the borrower.

1782. The borrower is obliged to return for the things lent a like quantity of other things of the same kind and quality, at the time agreed upon.—ff. L. 2, L. 3, de reb. cred.; Dom. l. c. s. 3, n. 1; Poth. Prêt C. 13, 14, 39, 40, 47; C. N. 1899, 1902. [III. 103.]

1783. If there be no agreement by which the time for the return can be determined, it is fixed by the court according to circumstances.—Poth. Prêt C.

n. 48; C. N. 1900, 1901. [III. 103.]

1784. If the borrower make default of satisfying the obligation to return things lent, he is bound at the option of the lender to pay the value which they bore at the time and place at which, according to the agreement, the return was to be made;—If the time and place of the return be not agreed upon, payment must be made of the value which the things bore at the time and place of the borrower being put in default;—With interest in both cases from the default. —ff. L. 22, de reb. cred. L. 4, de cond. trit.; Poth. Prêt C. 40, 41; Dom. l. c. n. 5; C. title *Of Obligations*, c. 6; Tr. Prêt, 288, 289, 293; 2 Pr. de la Jan. n. 538; C. N. 1903, 1904. [III. 103.]

CHAPTER THIRD.

OF LOAN UPON INTEREST.

1785. Interest upon loans is either legal or conventional. —The rate of legal interest is fixed by law at six per cent yearly.—The rate of conventional interest may be fixed by agreement between the parties, with the exception:

1. Of certain corporations mentioned in the act, intituled: *An act respecting interest*, which cannot receive more than the legal rate of six per cent;

2. Of certain other corporations which are limited as to the rate of interest by special acts;

3. Of banks, which cannot receive more than seven per cent.—C. S. C. c. 58, s. 3, 4, 8, 9; C. N. 1907. [III. 103.]

1786. An acquittance for the principal debt creates a presumption of payment of the interest, unless there is a reserve of the latter.—C. L. 2896; C. N. 1908. [III. 103.]

CHAPTER FOURTH.

ON CONSTITUTION OF RENT.

1787. Constitution of rent is a contract by which parties agree that yearly interest shall be paid by one of them upon a sum of money due to the other or furnished by him, to remain permanently in the hands of the former as a capital of which payment shall not be demanded by the party furnishing it, except as hereinafter provided.—It is subject with respect to the rate of interest to the same rules as loans upon interest. — Poth. C.R. 1, 4, 9, 43; 2 Pr. de la Jan. n. 540, p. 268 --; Tr. Prêt, 421, 463 --; C. N. 1909; C. 1790. [III. 103.]

1788. Constitution of rent may likewise be made by gift or will.—Author. under a. 1787. [III. 103.]

1789. Rents may be constituted either in perpetuity or for a term. When constituted in perpetuity they are essentially redeemable by the debtor; subject to the provisions contained in articles 390, 391 and 392.—O. 1441, a. 18; Poth. C. R. 51, 52, C. O. 19, 427; 1 Bour. 324, § 12; C. N. 1910, 1911. [III. 105.]

1790. The capital of a rent constituted in perpetuity may be demanded:

1. When the debtor of it fails to furnish and maintain the security to which he is obliged by the contract;

2. When the debtor becomes bankrupt or insolvent;

3. In the cases provided in articles 390, 391 and 392.—Poth. C. R. 48, 49, 66, 67, 71, 72, 73; 1 Bour. 325, s. 4; 2 Pr. de la Jan. n. 542, p. 271; C. N. 1912, 1913. [III. 105.]

1791. The rules concerning the prescription of arrears of constituted rents are contained in the title *Of Prescription.*—C. 2250. [III. 105.]

1792. The creditor of a constituted rent secured by the privilege and hypothec of a vendor has a right to demand that the sale under execution of property upon which such privilege and hypothec exists shall be made subject to the rent.—C. S. L. C., c. 50, s. 7. [III. 105.]

1793. The rules concerning life-rents are declared under the title *Of Life-Rents.* [III. 105.]

TITLE TENTH.

OF DEPOSIT.

1794. There are two kinds of deposit; simple deposit, and sequestration.—Poth. Dép. n. 1; C. N. 1916. [III. 105.]

CHAPTER FIRST.

OF SIMPLE DEPOSIT.

SECTION I

General provisions.

1795. It is of the essence of simple deposit that it be gratuitous.—ff. L. 1, § 8, depos.; Poth. Dép. n. 1-9; Dom. l. 1, t. 7, s. 1, n. 2; Tr. Dép. 1115; C. N. 1917. [III. 105.]

1796. Moveable property only can be the object of simple deposit.—Poth. Dép. n. 3; Dom. l. c. n. 3; Tr. Dép. 17, 18, 19; C. N. 1918. [III. 105.]

1797. Delivery is essential to the formation of the contract of deposit. — The delivery is sufficient when the depositary is already in possession, under any other title, of the thing which is the object of the deposit.—ff. L. 1, § 5, de obl. et act.; L. 1, § 14, depos. L. 8, mand. L. 18, § 1, de reb. cred.; Poth. Dép. 7, 8; Tr. Dép. 20, 21, 22; C. N. 1919. [III. 105.]

1798. Simple deposit is either voluntary or necessary. —C. N. 1920. [III. 107.]

SECTION II

Of voluntary deposit.

1799. Voluntary deposit is that which is made by the mutual consent of the party making and of the party receiving it.—f. L. 1, § 5, depos.; Poth. Dép. 14, 15; C. N. 1921. [III. 107.]

1800. Voluntary deposit can take place only between persons capable of contracting. —Nevertheless if a person capable of contracting accept a deposit made by a person incapable, he is liable to all the obligations of a depositary; which obligations may be enforced against him by the tutor or other administrator of the incapable person.—Inst. l. 1, t. 21, i. p.; Poth. Dép. 5, 6; Tr. Dép. 60; C. L. 2906; C. N. 1925. [III. 107.]

1801. If the deposit have been made with a person incapable of contracting, the party making it has a right to revendicate the thing deposited, so long as it remains in the hands of the former, and afterwards a right to demand the value of the thing in so far as it has been profitable to the depositary.—ff. L. 9, § 2, De min.; Poth. Dép. 6; Tr. Dép. 55, 56; C. N. 1926. [III. 107.]

SECTION III.

Of the obligations of the depositary.

1802. [The depositary is bound to apply in the keeping of the thing deposited the care of a prudent administrator.]—ff. L. 1, § 5, De obl. et act., L. 20, L. 32, depos.; Dom. l. 1, t. 7, s. 3, n. 1, 2, 7, 8; Poth. Dép. 23, 27, 30, 32; Tr. Dép. 63-65--; C. N. 1927, 1928. [III. 107.]

1803. The depositary has no right to use the thing deposited without the permission of the depositor.—Inst. l. 4, t. 1, § 6; ff. L. 25, § 1, L. 29, depos.; Dom. l. c. n. 16, § s. l. n. 15; Poth. Dép. 34-37; C. N. 1930. [III. 107.]

1804. The depositary is bound to restore the identical thing which he has received in deposit. — If the thing have been taken from him by irresistible force and something given in exchange for it, he is bound to restore whatever he has received in exchange.—Inst. l. 3, t. 15, § 3; ff. L. 17, § 1, L. 1, § 21, depos.; Dom. l. c. s. 3, n. 6; Poth. Dép. 40, 45; C. N. 1932, 1934. [III. 107.]

1805. The depositary is only held to restore the thing deposited, or such portion of it as remains, in the condition in which it is at the time of restoration. Deteriorations not caused by his fault fall upon the depositor. — Dom. l. c.; Poth. Dép. 41; C. 1150; C. N. 1933. [III. 109.]

1806. The heir or other legal representative of the depositary who sells the thing deposited, in good faith and in ignorance of the deposit, is held only to restore the price received for it, or to transfer his right against the buyer if the price have not been paid. —ff. L. 1, § 47, L. 2, L. 3, L. 4, depos.; Dom. l. c. n. 13; Poth. Dép. 45, 46; C. N. 1935. [III. 109.]

1807. The depositary is bound to restore any profits received by him from the thing deposited.—He is not bound to pay interest on money deposited unless he is in default of restoring it.—ff. L. 1, § 23 & 24, depos., L. 38, § 10 de usu.;

Cod. L. 2, depos.; Poth. Dép. 47, 48; C. N. 1936. [III. 109.]

1808. The depositary cannot exact from the depositor proof that he is owner of the thing deposited.—ff. L. 31, § 1, depos.; Poth. Dép. 51; C. N. 1938. [III. 109.]

1809. The restoration of the thing deposited must be made at the place agreed upon, and the cost of conveying it there is borne by the depositor. —If no place be agreed upon, the restoration must be made at the place where the thing is.—ff. L. 12, depos.; Dom. l. c. s. 2, n. 3; Poth. Dép. 56, 57; Tr. Dép. 168, 169; C. N. 1942, 1943. [III. 109.]

1810. The depositary is obliged to restore the thing to the depositor whenever it is demanded, although the delay for its restoration may have been fixed by the contract, unless he is prevented from so doing by reason of an attachment, or opposition, or other legal hindrance, or has a right of retention of the thing, as declared in article 1812.—ff. L. 1, § 45, depos.; Poth. Dép. 58, 59; C. N. 1944. [III. 109.]

1811. All the obligations of the depositary cease if he establish that he is owner of the thing deposited. — Poth. Dép. n. 4, 67; C. N. 1946. [III. 109.]

SECTION IV.

Of the obligations of the depositor.

1812. The depositor is bound to reimburse the depositary for the expenses incurred by the latter in the preservation and care of the thing, and to indemnify him for all losses that the deposit may have caused to him.—The depositary has a right to retain the thing deposited until such expenses and losses are paid to him.—ff. L. 8, § 23, depos.; Dom. l. c. n. 1, 2, 3; Poth. Dép. 59, 69, 70, 74; C. N. 1947, 1948. [III. 109.]

SECTION V.

Of necessary deposit.

1813. Necessary deposit is that which takes place under an unforeseen and pressing necessity arising from accident or irresistible force, as in case of fire, shipwreck, pillage or other sudden calamity. It is, in other respects, subject to the same rules as voluntary deposit, with the exception of the mode of proof.—ff. L. 1, § 1, 12, dep.; Dom. l. c. s. 7, n. 1, 2; Poth. Dép. 75; Sto. Bts. § 44, 59, 60; C. 1233; C. N. 1949, 1950. [III. 109.]

1814. Keepers of inns, of boarding-houses and of taverns, are responsible as depositaries for the things brought by travellers who lodge in their houses.—The deposit of such things is considered a necessary deposit.—ff. L. 1, i. p. § 1, 2, L. 3, § 1, L. 5, naut. caup. stab.; Danty, on c. 3. n. 21, p. 112; Poth. Dép. 79, 80; Tr. Dép. 217, 218, 228, 229; C. N. 1952. [III. 111.]

1815. The persons mentioned in the last preceding article are responsible if the things be stolen or damaged by their servants or agents, or

by strangers coming and going in the house.—But they are not responsible if the theft be committed by force of arms or the damage be caused by irresistible force; nor are they responsible if it be proved that the loss or damage is caused by a stranger and has arisen from neglect or carelessness on the part of the person claiming it.—ff. L. 1, § 8, L. 2, L. 3, naut. caup. stab. L. 1, furti adv. naut. etc.; Danty, l. c. n. 26, p. 114; Lepr. cent. 1. c. 19; Poth. Dép. 78; C. L. 2938; C. N. 1953, 1954. [III. 111.]

1816. The rules declared in article 1677 apply also to the liability of keepers of inns, boarding-houses and taverns, and as regards the oath to be be offered.—Author. under a. 1677. [III. 111.]

CHAPTER SECOND.

OF SEQUESTRATION.

1817. Sequestration is either conventional or judicial.—Poth. Dép. 84; C. N. 1955. [III. 111.]

SECTION I

Of conventional sequestration.

1818. Conventional sequestration is the deposit made by two or more persons of a thing in dispute, in the hands of a third person who obliges himself to restore it after the termination of the contest, to the person to whom it may be adjudged.—ff. L. 6, L. 77, depos.; Dom. l. c. s. 4, n. 1; Poth. Dép. 1, 84; C. N. 1956. [III. 111.]

1819. Sequestration is not essentially gratuitous. It is in other respects subject to the rules generally applicable to simple deposit, when these are not inconsistent with the articles of this chapter.—Dom. l. c. n. 3; Poth. 89, 90; C. N. 1957, 1958. [III. 111.]

1820. Sequestration may have for its object immoveable as well as moveable property.—Dom. l. c. n. 1; Poth. Dép. 87; C. N. 1959. [III. 111.]

1821. The sequestrator cannot be discharged until the termination of the contestation, unless it is by the consent of all the parties interested, or by the court for sufficient cause.—ff. L. 5, § 2, dep.; Dom. l. c. n. 6; Poth. Dép. 88; C. N. 1960. [III. 111.]

1822. When the sequestration is not gratuitous it is assimilated to the contract of lease and hire, and the obligations of the sequestrator for the safe-keeping of the thing are the same as those of the lessee.—Dom. l. c. n. 3; Poth. Dép. 90. [III. 111.]

SECTION II.

Of judicial sequestration.

1823. Sequestration or deposit may take place by judicial authority:

1. Of moveable property seized under process of attachment, or taken in execution of a judgment;

2. Of money or other things tendered and deposited by a debtor in a suit pending;

3. The court upon application by the interested party may, according to circum-

stances, order the sequestration of a thing, moveable or immoveable, concerning the property or possession of which two or more persons are in litigation. —1 Cou. 123; O. 1667, t. 19, a. 12; Guy. Revendication, 621; Imb. Enchiridion, 195-6; Poth. Dép. a. 2, c. 4, n. 91, 92, 95, 98, 99, P. C. c. 3, a. 2; 1 Pi. 114, 115, 117, 170, 172, 387, 388; Tr. Dép. n. 287 -- 293; C. N. 1961. [III. 113.]

1824. The sequestration may also take place by judicial authority in the following cases specified in this code:

1. When the usufructuary cannot give security as specified in article 465;

2. When the substitute is put in possession under article 955. [III. 113.]

1825. The guardian or sequestrator appointed by judicial authority is bound to apply to the safe-keeping of the things seized the care of a prudent administrator.—He is bound to produce the things either for the purpose of being sold in due course of law or to be delivered to the party entitled to them under the judgment of the court.—He is also bound to render an account of his administration when judgment is rendered in the cause, and as often as is ordered by the court during its pendency. — He is entitled to be paid, by the party seizing, such compensation as is fixed by law or by the court; unless he has been presented by the party on whom the seizure is made.—Poth. Dép. 91, 92, 95, 96; C. N. 1962. [III. 113.]

1826. The thing sequestered cannot be leased directly nor indirectly to any of the parties in the contest concerning it.—O. 1667, t. 19, a. 18. [III. 113.]

1827. The sequestrator appointed by judicial authority, to whom the thing has been delivered, is subject to all the obligations which attach to conventional sequestration. — Poth. Dép. 98; C. N. 1963. [III. 113.]

1828. The judicial sequestrator may obtain his discharge after the lapse of three years, unless, for special reasons, the court has continued his functions beyond that period.—He may also be discharged by the court within that time upon cause shewn.—O. 1667, t. 19, a. 21. [III. 113.]

1829. The special rules concerning judicial sequestration or deposit are contained in the Code of Civil Procedure. [III. 113.]

TITLE ELEVENTH.

OF PARTNERSHIP.

CHAPTER FIRST.

GENERAL PROVISIONS.

1830. It is essential to the contract of partnership that it should be for the common profit of the partners, each of whom must contribute to it property, credit, skill, or industry.—ff. L. 5, L. 29, L. 52, pro. soc.; Vin. Com. L. 3, t. 26, s. 1; Dom. l. 1, t. 8, s. 1, n. 1 --; Poth. Soc. n. 8, 11, 12; Tr. Soc. n. 318; Coll. Part. 2; C. N. 1832, 1833. [III. 115.]

1831. Participation in the profits of a partnership carries with it an obligation to contribute to the losses.—Any agreement by which one of the partners is excluded from participation in the profits is null. —An agreement by which one partner is exempt from liability for the losses of the partnership is null only as to third persons. ff. L. 29, § 2, L. 30, pro. soc.; Dom. l. c. n. 10; Poth. Soc. n. 20, 21, 25, 75; Tr. Soc. n. 654 --; C. L. 2784, 2785; Gow, 9, 153, 154; K. Com. 24-29; Coll. Part. 9; C. N. 1855. [III. 115.]

1832. If no time for the commencement of the partnership be designated, it takes effect from the date of the contract.—Poth. Soc. n. 64; Coll. Part. 113; C. N. 1843. [III. 115.]

1833. If the term of the partnership be not designated, it is considered to be for the life of the partners; subject to the provisions contained in the fifth chapter of this title.—ff. L. 65, § 10, pro. soc.; Poth. Soc. n. 65; 2 Bell, Com. 640, § 1227; Sto. Part. § 84; C. N. 1844; C. 1892, 1895. [III. 115.]

1834. In partnerships for trading, manufacturing or mechanical purposes, or for the construction of roads, dams and bridges, or for the purpose of colonization, or of settlement, or of land traffic, the partners must deliver to the prothonotary of the Superior Court in each district, and to the registrar of each county, in which they carry on business, a declaration in writing, in the form and subject to the rules provided in the statute intituled: *An Act respecting Partnerships.* — The omission to deliver such declaration does not render the partnership null; it subjects the contravening parties to the penalties and liabilities imposed by the statute.—C. S. L. C. c. 65, s. 1, 3. [III. 115.]

1835. The allegations contained in the declaration mentioned in the last preceding article cannot be controverted by any person who has signed the same, nor can they be controverted, as against any party not being a partner, by a person who has not signed but was really a member of the

partnership at the time the declaration was made; and no partner, whether he has signed or not, is deemed to have ceased to be a partner until a new declaration has been made and filed as aforesaid, stating the alteration in the partnership. Ib. s. 2. [III. 115.]

1836. Any partner, although not mentioned in the declaration, may be sued jointly and severally with the partners mentioned therein, or the latter may be sued alone, and, if judgment be recovered against them, any other partner or partners may be sued on the original cause of action on which such judgment was rendered.—Ib. s. 2, § 2. [III. 115.]

1837. When persons are associated as partners in Lower Canada for any of the purposes mentioned in article 1834, and no declaration has been filed as aforesaid, any action which might be brought against all the members of the partnership, may also be brought against any one or more of them, as carrying on or as having carried on trade jointly with others, without naming such others in the writ or declaration, under the name and style of their partnership firm; and if judgment be recovered against him or them, any other partner or partners may be sued jointly or severally on the original cause of action on which such judgment has been rendered; but when any such action is founded on an obligation or instrument in writing in which all or any of the partners bound by it are named, then all the partners named therein must be made parties to such action. —Ib. s. 4, § 1, 2. [III. 117.]

1838. The service of summons or process, for any claim or demand founded upon any liability of an existing partnership, at the office or place of business of such partnership within the province of Canada, has the same effect as a service made upon the members of such partnership personally, and any judgment rendered against any member of such existing partnership, for a partnership debt or liability, may be enforced by process of execution against the partnership property in the same manner as if the judgment had been rendered against the partnership. —Ib. s. 4, § 3; C. S. L. C., c. 83, s. 63. [III. 117.]

CHAPTER SECOND.

OF THE OBLIGATIONS AND RIGHTS OF PARTNERS AMONG THEMSELVES.

1839. Each partner is a debtor to the partnership for all that he has agreed to contribute to it.—When such contribution consists of a certain thing and the partnership is evicted of it, the partner is subject to warranty in the same manner as a seller is in favor of the buyer.—Poth. Soc. n. 109, 110, 113; C. N. 1845. [III. 117.]

1840. A partner who fails to pay any sum of money which he has agreed to contribute to the partnership is liable for interest on such sum from the

day of his default.—He is also liable for interest upon any sum taken by him from the partnership funds for his particular benefit, from the day that he has withdrawn it.—ff. L. 60, pro soc.; L. 1, § 1; L. 3, § 9, de usuris; Poth. Soc. n. 116; Sto. Part. § 173; C. N. 1846. [III. 117.]

1841. The provisions contained in the last two preceding articles are without prejudice to the rights of the other partners to damages against the partner in default, and to obtain a dissolution of the partnership, according to the rules contained in the title *Of Obligations* and in article 1896.—C. title *Of Obligations*, c. 6. [III. 117.]

1842. A partner cannot carry on privately any business or adventure which deprives the partnership of a portion of the skill, industry, or capital which he is bound to employ therein. If he do so, he is obliged to account to the partnership for the profits of such business.—Poth. Soc. n. 59, 32, 120; 2 Bou.-Pat. 94; Sto. Part. § 177, 178; C. N. 2847. [III. 117.]

1843. When a partner is creditor individually of a person who is also indebted to the partnership, and both debts are actually payable, the imputation of any payment received by him from the debtor, is made upon both debts in proportion to their respective amounts, although by the receipt, he may have imputed it upon his private debt only; but if by the receipt he impute the payment wholly upon the partnership debt, such imputation is to be maintained.—Poth. Soc. n. 121; Coll. Part. 381; C. N. 1848. [III. 117.]

1844. When a partner has been paid his full share of a debt due to the partnership, and the debtor becomes insolvent, such partner is obliged to return to the partnership what he has received, although he may have given a discharge specially for his part.—ff. L. 63, § 5, pro soc.; Poth. Soc. n. 122; Coll. Part. 380; C. N. 1849. [III. 119.]

1845. Each partner is liable to the partnership for damages caused by his fault. He cannot set up in compensation of such damages the profits which the partnership has derived from his industry in other affairs.—ff. L. 23, § 1, L. 25, L. 26, pro. soc.; Poth. Soc. n. 124, 125; Dom. l. c. s. 4, § 7, 8; Sto. Part. § 170, 171; C. N. 1850. [III. 119.]

1846. A certain and determinate thing which does not consume by use, and of which the enjoyment only is contributed to the partnership, is at the risk of the partner who is the owner of it. — Things which consume by use or deteriorate by keeping, or which are intended to be sold, or are contributed to the partnership at a fixed valuation, are at the risk of the partnership.—ff. L. 58, pro soc.; Poth. Soc. n. 54, 125, 126; 2 Bell, Com. 615; C. N. 1851. [III. 119.]

1847. A partner has a right against the partnership not only to recover money disbursed by

him for it, but also to be indemnified for obligations contracted by him in good faith in the business of the partnership, and for the risks inseparable from his management.—ff. L. 52, § 15, L. 60, L. 67, pro soc.; Poth. Soc. n. 127, 128; Dom. l. c. § 11, 12; C. N. 1852. [III. 119.]

1848. [When there is no agreement concerning the shares of the partners in the profits and losses of the partnership, they share equally.] —Guy. Soc. 331; Inst. de soc. § 1; ff. L. 29, pro soc.; Poth. Soc. n. 73, 16; Dom. l. c. s. 1, n. 3-6; Tr. Soc. 614, 615; 13 Toul. 409; Coll. 105, 106; Sto. Part. § 24-26; C. L. 2836; C. N. 1853. [III. 119.]

1849. A partner charged with the management of the business of the partnership by a special clause in the contract, may perform all acts connected with his management, notwithstanding the opposition of the other partners, provided he act without fraud.—Such power of management cannot be revoked without sufficient cause while the partnership continues; but if the power be given by an instrument posterior to the contract of partnership, it is revokable in the same manner as a simple mandate.—Poth. Soc. n. 71; 1 Stair. Inst. 157; Coll. Part. 753-759; Sto. Part. § 204; C. L. 2838; C. N. 1856. [III. 119.]

1850. When several of the partners are charged with the management of the business of the partnership generally, and without a provision that one of them shall not act without the others, each of them may act separately; but if there be such a provision, one of them cannot act in the absence of the others, although it be impossible for the latter to join in the act.—ff. Arg. ex L. 1, § 13, 14, De exerc. act.; Poth. Soc. n. 72; Wat. Part. 81 --; 2 Bell, Com. 615; 3 Kt. Com. 44; C. N. 1857, 1858. [III. 121.]

1851. If there be no special stipulation as to the management of the business of the partnership, the following rules apply:

1. The partners are presumed to have mutually given to each other a mandate for the management, and whatever is done by one of them binds the others; saving the right of the latter, together or separately, to object to any act before it is concluded;

2. Each partner may use the things belonging to the partnership, provided he apply them to their customary and destined use, and that he do not use them against the interest of the partnership, or in a manner to prevent his copartners from making use of them according to their right;

3. Each partner may compel his copartners to bear with him the expenses which are necessary for the preservation of the property of the partnership;

4. One of the partners cannot make alterations in the immoveable property of the partnership without the consent of the others, although he should

establish that such alterations are advantageous.—ff. L. 12, L. 28, De com. divid., L. 27, § 1, De serv. urb. præd., L. 11, Si serv. vind.; Poth. Soc. n. 84, 86, 87, 90; 3 Kt. Com. 45; 4 Par. n. 1021; Coll. Part. 128, 129, 250, 282; Sto. Part. § 102, p. 150, 151, n. 1, § 123, 125; C. N. 1859. [III. 121.]

1852. A partner who has no right of management cannot alienate or otherwise dispose of anything which belongs to the partnership; saving the rights of third persons as hereinafter declared.—ff. L. 68, pro soc.; Poth. Soc. n. 89; C. N. 1860. [III. 121.]

1853. Each partner may, without the consent of his copartners, associate with himself a third person in the share he has in the partnership. He cannot without such consent associate him in the partnership.—ff. L. 19, pro. soc., L. 21, L. 22, L. 47, § ult., De reg. jur.; Poth. Soc. n. 91; Coll. Part. p. 103; 2 Bell, Com. p. 636; C. N. 1861. [III. 121.]

CHAPTER THIRD.

OF THE OBLIGATION OF PARTNERS TOWARD THIRD PERSONS.

1854. Partners are not jointly and severally liable for the debts of the partnership. They are liable to the creditor in equal shares, although their shares in the partnership may be unequal.—This article does not apply in commercial partnerships.—Poth. Soc. n. 98, 103, 104, 106; C. N. 1862, 1863. [III. 121.]

1855. A stipulation that the obligation is contracted for the partnership binds only the partner contracting, when he acts without the authority, express or implied, of his copartners; unless the partnership is benefited by his act, in which case all the partners are bound. — Poth. Soc. 105; C. 1866; C. N. 1864. [III. 121.]

1856. The liabilities of partners for the acts of each other are subject to the rules contained in the title *Of Mandate*, when not regulated by any article of this title.—C. title *Of Mandate*, c. 3, s. 2. [III. 123.]

CHAPTER FOURTH.

OF THE DIFFERENT KINDS OF PARTNERSHIPS.

1857. Partnerships are either universal or particular. They are also either civil or commercial.—ff. L. 5, i. p. pro soc.; Poth. Soc. c. 2, i. p.; Dom. l. 1, t. 8, s. 3; Tr. Soc. 317 --; Sto. Part. § 72 --; C. N. 1835. [III. 123.]

SECTION I.

Of universal partnerships.

1858. Universal partnership may be either of all the property or of all the gains of the partners.—ff. L. 3, § 1, pro soc.; Poth. Soc. n. 28; C. N. 1836. [III. 123.]

1859. In universal partnership of property, all the property of the partners, moveable and immoveable, and all their gains, as well present as future, are put in common.—ff. L. 1, L. 3, pro soc.; Poth. Soc. n. 29, 43; Dom. l. 1, t. 8,

s. 3, n. 4; Sto. Part. § 72, 73; C. N. 1837. [III. 123.]

1860. Parties contracting a universal partnership are presumed to intend only a partnership of gains, unless the contrary is expressly stipulated.—ff. L. 7, pro soc.; Poth. l. c.; C. N. 1839, [III. 123.]

1861. In a universal partnership of gains is included all that the partners acquire by their industry in whatever employment they are engaged during the continuance of the partnership. The moveable property and the enjoyment of the immoveables possessed by the partners at the date of the contract are also included; but the immoveables themselves are not included.—ff. L. 7, pro soc.; Vinn., ad inst. l. 3, t. 20, intr.; Poth. Soc. n. 43-45; Dom. l. c. n. 3; Sto. Part. § 73; C. N. 1838. [III. 123.]

SECTION II.

Of particular partnerships.

1862. Particular partnerships are those which apply only to certain determinate objects. A partnership contracted for a single enterprise or for the exercise of any art or profession is also a particular partnership.—ff. L. 5, i. p., L. 71, pro soc.; Poth. Soc, n. 54-56; Dom. l. c. § 1; C. N. 1841, 1842. [III. 123.]

SECTION III.

Of commercial partnerships.

1863. Commercial partnerships are those which are contracted for carrying on any trade, manufacture or other business of a commercial nature, whether general or limited to a special branch or adventure. All other partnerships are civil partnerships.—Tr. Soc. 317; Sto. Part. § 75; C. L. 2795-2797. [III. 123.]

1864. Commercial partnerships are divided into:

1. General partnerships;
2. Anonymous partnerships;
3. Partnerships *en commandite*, or limited partnerships;
4. Joint-stock companies.

They are governed by the rules common to other partnerships, when these are not inconsistent with the rules contained in this section, and with the laws and usages specially applicable in commercial matters.—Poth. Soc. n. 56, 57, 60, 61, 82; O. 1673, t. 4, a. 1; C. Co. 19; Tr. Soc. on a. 1841, 1842, n. 317, 358, 359, 444; Sto. Part. § 78, 79; 2 Bell, Com. b. 7, c. 2; C. N. 1873. [III. 125.]

§ 1. *Of general partnerships.*

1865. General partnerships are those contracted for the purpose of carrying on business under a collective name or firm consisting ordinarily of the names of the partners, or of one or more of them, all of whom are jointly and severally liable for the obligations of the partnership.—Poth. l. c.; C. Co. 20, 21, 22; Tr. Soc. 359, 360; Sto. Part. l. c.; Bec. Q. p. 50, *n.* on def. of a. 20, C. Co.; Bell, l. c. [III. 125.]

1866. The partners may

make such stipulations among themselves concerning their respective powers in its management of the partnership business as they see fit, but with respect to third persons dealing with them in good faith, each partner has an implied power to bind the partnership for all obligations contracted in its name and in its usual course of dealing and business.—Poth. Ob. n. 83, 89, Soc. n. 90-100; 4 Par. 1024; Sto. Part. § 109, n. 2; 2 Bell, Com. 615, 616; author. under a. 1851. [III. 125.]

1867. The partners are liable for obligations contracted by one of them, in his own name, only when the obligation is for objects which are in the usual course of dealing and business of the partnership, or are applied to its use.—Maguire & Scott, 7 L. C. R. 451; 3 Kt. Com. 41; 4 Par. 1025, 1049. [III. 125.]

1868. Dormant or unknown partners are, during the continuance of the partnership, subject to the same liabilities toward third persons as ordinary partners under a collective name.—C. S. L. C., c. 65, s. 3, 4; Maguire & Scott, 7 L. C. R. 451; 3 Par. 1049; Sto. Part. § 80; 3 Kt. Com. 31, 32; Coll. Part. 212, 221 --. [III. 125.]

1869. Nominal partners, and persons who give reasonable cause for the belief that they are partners, although not so in fact, are liable as such to third parties dealing in good faith under that belief.—4 Par. 1009, p. 83, 84; Coll. Part. p. 50; 2 Bell, Com. 626; Pars. M. L. p. 167 & n. 3; Kt. l. c.; Symes & Sutherland, St. Rep. p. 49. [III. 125.]

§ 2. *Of anonymous partnerships.*

1870. In partnerships having no name or firm, whether they are general or confined to a single object or adventure, the partners are subject to the same liabilities in favor of third persons as in ordinary partnerships under a collective name.—Maguire & Scott, l. c.; 2 Bell, Com. 630; Coll. Part. 26, 221; Poth. Soc. 61, 62, 63. [III. 127.]

§ 3. *Of partnerships* en commandite *or limited partnerships.*

1871. Partnerships *en commandite*, or limited partnerships, for the transaction of any mercantile, mechanical, or manufacturing business, other than the business of banking and of insurance, may be formed under the statute intituled, *An act respecting limited partnerships.*—C. S. C. c. 60, s. 1. [III. 127.]

1872. Such partnerships consist of one or more persons called general partners, and of one or more persons who contribute in cash payments a specific sum or capital to the common stock and who are called special partners.—Ib. s. 2. [III. 127.]

1873. The general partners are jointly and severally responsible in the same manner as ordinary partners under a

collective name; but special partners are not liable for the debts of the partnership beyond the amounts contributed by them to the capital.—Ib. s. 3. [III. 127.]

1874. The general partners only can be authorized to transact business and sign for the partnership, and to bind the same.—Ib. s. 4. [III. 127.]

1875. Persons contracting limited partnerships are bound to make and severally sign a certificate containing:

1. The name or firm of the partnership;

2. The general nature of the business to be caried on;

3. The names of all the general and special partners, distinguishing which are general and which special, and their usual place of residence;

4. The amount of capital stock contributed by each special partner;

5. The period at which the partnership commences and that of its termination.—Such certificate is to be made, filed and recorded in the form and manner prescribed in the statute specified in article 1871. —Ib. s. 5-7. [III. 127.]

1876. The partnership is not deemed to be formed until the certificate is made, filed and recorded, as indicated in the last preceding article.—Ib. s. 8. [III. 127.]

1877. If any false statement be made in the certificate, all the persons interested in the partnership are liable for its obligations, in the same manner as ordinary partners under a collective name.—Ib. s. 8. [III. 127.]

1878. In case of any renewal or continuance of the partnership beyond the time originally fixed for its duration, a certificate thereof must be made, filed and recorded in the manner required for the original formation. Any partnership otherwise renewed or continued is deemed a general partnership.—Ib. s. 9. [III. 127.]

1879. Every alteration in the names of the [general] partners, in the nature of the business, or in the capital or shares, or in any matter, [other than the names of the special partners,] specified in the original certificate, is deemed a dissolution of the partnership; and if it be carried on after such alteration, it is deemed a general partnership, unless renewed as a limited partnership in the manner provided in the last preceding article.—Ib. s. 10. [III. 129.]

1880. The business of the partnership is to be conducted under a partnership name or firm, in which the name of the general partners only, or of one or more of them, is used; and if the name of a special partner be used in the firm with his privity, he is deemed a general partner. — Ib. s. 11. [III. 129.]

1881. Suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners. —Ib. s. 12. [III. 129.]

1882. No part of the sum which any special partner has contributed to the capital stock can be withdrawn by him, or paid or transferred to him in the form of dividends, profits or otherwise, during the continuance of the partnership; but he may annually receive lawful interest on the sum so contributed by him, if the payment of such interest do not reduce the original amount of the capital, and he may also receive his portion of the profits. —Ib. s. 13. [III. 129.]

1883. If by the payment of interest or supposed profits the original capital be reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the deficient capital, with interest. — Ib. s. 14. [III. 129.]

1884. A special partner may, from time to time, examine into the state and progress of the affairs of the partnership, and may advise as to its management; but he cannot transact any business on account of the partnership, nor be employed by it as agent, attorney or otherwise. If he act in contravention of the provisions of this article, he is deemed a general partner.—Ib. s. 15. [III. 129.]

1885. The general partners are liable to account to each other and to the special partners for the management of the business of the partnership, in the same manner as ordinary partners under a collective name. — Ib. s. 16. [III. 129.]

1886. In case of the insolvency or bankruptcy of the partnership, no special partner is allowed, under any circumstances, to claim as a creditor, until the claims of all the other creditors of the partnership have been satisfied.—Ib. s. 17. [III. 129.]

1887. No dissolution of the partnership by the acts of the parties can take place previously to the time specified in the certificate of its formation, or the certificate of its renewal, until notice of such dissolution has been filed and published in the manner provided in the act specified in article 1871.—Ib. s. 18. [III. 129.]

1888. Partnerships for the business of banking are regulated by special acts of incorporation, and by the acts intituled, *An act respecting incorporated banks*, and *An act respecting banks and freedom of banking*.—C. S. C. c. 54, 55, 21, 56. [III. 131.]

§ 4. *Of joint-stock companies.*

1889. Joint-stock companies are formed either under the authority of a royal charter, or of an act of the legislature, and are governed by its provisions; or they are formed without such authority, and in the latter case, are subject to the same general rules as partnerships under a collective name. —2 Bell, Com. 622; Coll. Part. 401-402; Gow, 237, 238; 3 Kt. Com. 26; Sto. Part. § 164. [III. 131.]

1890. The names of the partners or stockholders do

not appear in joint-stock companies, which are generally known under an appellation indicating the object of their formation. The business is carried on by directors or other mandataries, who are appointed from time to time, according to the rules established for the governance of such companies respectively.—Bell, l. c. [III. 131.]

1891. Any seven or more persons may in like manner associate themselves together for the purpose of carrying on any labor, trade or business, except the working of mines, minerals, or quarries, and the business of banking or insurance, in conformity with the provisions of the act of 1865, intituled *An act to authorize the formation of companies or co-operative associations for the purpose of carrying on, in common, any trade or business.*—The formation and governance of joint-stock companies and corporations for particular objects are provided for by special statutes. —C. S. C. c. 63-70. [III. 131, 383.]

CHAPTER FIFTH.

OF THE DISSOLUTION OF PARTNERSHIP.

1892. Partnership is dissolved:

1. By the efflux of time;

2. By the extinction or loss of the partnership property;

3. By the accomplishment of the business for which it was contracted;

4. By bankruptcy;

5. By the death of one of the partners;

6. By the civil death, or interdiction, or bankruptcy of one of the partners;

7. By the will of one or more of the partners not to continue the partnership, according to articles 1895 and 1896;

8. By the business of the partnership becoming impossible or unlawful. —Limited partnerships are also determined by the causes declared in article 1879, to which article the causes of dissolution declared in the above paragraphs 5 and 6 are subjected.—The causes of dissolution declared in paragraphs 5, 6, 7, do not apply to joint-stock companies formed under the authority of a royal charter or of an act of the legislature.—ff. L. 4, § 1, L. 63, § 10, L. 65, § 1, 3, 9, 10, 12, L. 25, L. 52, § 9, pro soc.; Dom. l. 1, t. 8, s. 5; Poth. Soc. n. 138 --; 2 Bell, Com. c. 3, p. 639 --; Sto. Part. § 267, 269, 274; Coll. Part. b. 1, c. 2, s. 2; 4 Par. t. 3. c. 1-3, n. 1051 --; Sto. Part. § 290 & *n.* 4; 3 Kt. Com. 54; C. N. 1865. [III. 131.]

1893. When one of the partners has promised to put in common the property in a thing, the loss of such thing before the contribution of it has been made, dissolves the partnership with respect to all the partners. —The partnership is equally dissolved by the loss of the thing when only the enjoyment of it is put in common, and the property of the thing remains with the partner. — But the partnership is not dissolved by the loss of the thing of which

the property has already been brought into the partnership; unless such thing constitutes the whole capital stock of the partnership, or is so important a part of it that the business of the partnership cannot be carried on without it.—ff. L. 63, § 10, pro soc.; Dom. l. 1, t. 8, s. 5, n. 11, 12; Poth. Soc. n. 141; Tr. Soc. 925 --; C. N. 1867. [III. 133.]

1894. It may be stipulated that in case of the death of one of the partners, the partnership shall continue with his legal representative, or only between the surviving partners. In the latter case, the representative of the deceased partner is entitled to a division of the partnership property, only as it exists at the time of the partner's death. He cannot claim the benefit of any transaction subsequent thereto, unless such transaction is a necessary consequence of something done before the death occurred.—Dom. l. 1, t. 8, s. 5, n. 14 & s. 6, n. 2; Poth. Soc. n. 144, 145; Tr. Soc. 949 --; C. N. 1868; ff. L. 35, L. 50, L. 52, § 9, L. 59, pro. soc. [III. 133.]

1895. Those partnerships only which are not limited as to duration can be dissolved at the will of any one of the partners, by a notice to all the others of his renunciation. Such renunciation must be in good faith, and not made at a time unfavorable for the partnership.—ff. L. 63, § 3, 4, 5, 6, pro. soc.; Poth. Soc. n. 149, 150, 151; Tr. Soc. 965, 977; Coll. c. 2, s. 2, 58, 59; 2 Bell, Com. 641, 642; C. L. 2855, 2856, 2857; C. N. 1869. [III. 133.]

1896. The dissolution of a partnership limited as to duration, may be demanded by one of the partners before the expiration of the stipulated term, upon just cause shown, or when another partner fails to fulfil his engagement, or is guilty of gross misconduct, or from habitual infirmity or physical impossibility is unable to attend to the business of the partnership, or when his condition and status are essentially changed, and in other cases of a like nature.—ff. L. 14; L. 15, pro soc.; Poth. Soc. n. 152; Tr. Soc. 983 --, 992 --; Coll. l. c.; 2 Bell, Com. 642, 644; Sto. Part. § 288, 294; C. N. 1871. [III. 133.]

CHAPTER SIXTH.

OF THE EFFECTS OF DISSOLUTION.

1897. The mandate and powers of the partners to act for the partnership cease with its dissolution, except for such acts as are a necessary consequence of business already begun; nevertheless whatever is done in the usual course of dealing and business of the partnership, by a partner acting in good faith and in ignorance of the dissolution, binds the other partners, in the same manner as if the partnership still subsisted.—ff. L. 65, § 10, pro. soc.; Poth. Soc. n. 155, 156; 2 Bell, Com. 646, 653; 4 Par. 1070; Tr. Soc. 996; 3 Kt. Com. 62, 63; Sto. Part. 332, 333; C. 1720, 1728, 1729; Coll.

Part. 75; Gow, 227, 228. [III. 133.]

1898. Upon the dissolution of the partnership, each partner or his legal representative may demand of his copartners an account and partition of the property of the partnership; such partition to be made according to the rules relating to the partition of successions, in so far as they can be made to apply.—Nevertheless, in commercial partnerships these rules are to be applied only when they are consistent with the laws and usages specially applicable in commercial matters.—Dom. l. 1, t. 8, s. 5, n. 19; Poth. Soc. 161 --; 4 Par. 1071; Tr. Soc. 996, 998, 1057 --; C. N. 1872. [III. 135.]

1899. The property of the partnership is to be applied to the payment of the creditors of the firm, in preference to the separate creditors of any partner; and in case such property be found insufficient for the purpose, the private property of the partners, or of any one of them is also to be applied to the payment of the debts of the partnership; but only after the payment out of it, of the separate creditors of such partners or partner respectively.—C. S. L. C. c. 65, s. 6; Montgomery and Grant et al. St. Rep. 437; 4 Par. 1089. [III. 135.]

1900. The dissolution of a partnership by the terms of the contract, or the voluntary act of the partners, or by the expiration of time, or by the death or retirement otherwise of a partner, does not affect the rights of third persons dealing afterwards with any of the partners on account of the partnership firm; except in the cases following:

1. When notice is given as required by law or the usage of trade;

2. When the partnership is limited to a particular enterprise or adventure which is terminated before the transaction takes place;

3 When the transaction is not within the usual course of dealing and business of the partnership;

4. When the transaction is in bad faith or illegal, or otherwise void;

5. When the partner sought to be charged is a dormant or unknown partner, to whom no credit is actually given, and who has retired before the transaction takes place.—Poth. Soc. n. 157; Tr. Soc. 903, 904, 908, 910; 4 Par. 1088; Sto. Part. 334; 3 Kt. Com. 65, 66; 2 Bell, Com. 649 --; Coll. Part. b. 1, c. 2, b. 3, c. 3, § 2, 3; Gow, 20, 240, 248 --; Sutherland and Robertson et al, St. Rep. 49. [III. 135.]

TITLE TWELFTH.

OF LIFE-RENTS.

CHAPTER FIRST.

GENERAL PROVISIONS.

1901. Life-rents may be constituted for valuable consideration; or gratuitously, by gift or will.—Poth. C. R. n. 15; Tr. Cont. aléat. 213, 214; C. N. 1968, 1969. [III. 135.]

1902. The rent may be upon the life of the person who constitutes it, or who receives it, or upon the life of a third person who has no right to the enjoyment of it.—Poth. C. R. n. 223, 226; C. N. 1971. [III. 135.]

1903. It may be constituted upon one life or upon several lives.—But if it be for more than ninety-nine years or three successive lives, and affect real estate, it becomes extinct thereafter as provided in article 390.—Poth. C. R. n. 215, 223, 225; C. S. L. C. c. 50, s. 6; C. N. 1972. [III. 135.]

1904. It may be constituted for the benefit of a person other than the one who gives the consideration.—Poth. C. R. n. 241; C. 1029; C. N. 1973. [III. 137.]

1905. A life-rent constituted upon the life of a person who is dead at the time of the contract produces no effect, and the consideration paid for it may be recovered back.—Poth. C. R. n. 224; C. N. 1974. [III. 137.]

1906. [The rule declared in the last preceding article applies equally when the person upon whose life the rent is constituted is, without the knowledge of the parties, dangerously ill of a malady of which he dies within twenty days after the date of the contract.]—Poth. C. R. n. 225; Tr. Cont. aléat. n. 262, 263; 6 Boi. 536; C. N. 1975. [III 137.]

CHAPTER SECOND.

OF THE EFFECTS OF THE CONTRACT.

1907. Non-payment of arrears of a life-rent is not a cause for recovering back the money or other consideration given for its constitution.—Poth. C R. 227, 231; C. N. 1978. [III. 137.]

1908. The creditor of a life-rent secured by the privilege and hypothec of a vendor upon immoveable property, afterwards seized to be sold under execution, has a right to demand that the property shall be sold subject to the life-rent as a charge upon it.—C. S. L. C. c. 50, s. 7. [III. 137.]

1909. The debtor of the rent cannot free himself from the payment of it by offering to reimburse the capital and renouncing all claim to receive back the payments made.—Poth. C. R. n. 233, 255; C. N. 1979. [III. 137.]

1910. The rent is due only for the number of days that the person upon whose life it is constituted lives; unless it is made payable in advance.—Poth. C. R. n. 248, 255; Tr. Cont. aléat. 330-332, 334; C. N. 1980. [III. 137.]

1911. A stipulation that the life-rent cannot be seized or taken in execution is without effect, unless it is constituted by a gratuitous title.—Poth. C. R. n. 252; C. N. 1981. [III. 137.]

1912. The obligation to pay a life-rent is not extinguished by the civil death of the person upon whose life it is constituted. It continues during his natural life.—Poth. C. R. 256; C. N. 1982. [III. 137.]

1913. The creditor of a life-rent on demanding payment of it must establish the existence of the person on whose life it is constituted, up to the time for which the arrears are claimed.—Poth. C. R. 257; C. N. 1983. [III. 137.]

1914. [When an immoveable hypothecated for the payment of a life-rent is sold by a forced sale or other proceeding having the same effect, or by a voluntary sale followed by confirmation of title, the posterior creditors are entitled to receive the proceeds of the sale on giving sufficient security for the continued payment of the rent, and in default of such security being given, the creditor of the rent is collocated, according to the order of his hypothec, for a sum equal to the value of the rent at the time of collocation.] — Poth. C. R. 231; Tr. Hyp. 959; Hou. O. C. 205, 296. [III. 139.]

1915. [The value of a life-rent is estimated at the sum which, at the time of collocation, would be sufficient to purchase from a life-assurance company a life-annuity of like amount.]—Author. under a. 1914. [III. 139.]

1916. If the price of the immoveable be less than the estimated value of the life-rent the creditor of it is entitled to receive such price, according to the order of his hypothec, or security from the posterior creditors for the payment of the rent until the price received by them and the interest is exhausted by such payments.—Dal. Hyp. 29, 2, 258, 259, 7; 3 Delv. 419; 2 Rog. 2552; 5 Bio. 313, n. 275; Tr. Hyp. n. 959. p. 205; 1 Gren. n. 185. [III. 139.]

1917. The estimation of the life-rent and its payment, in all cases in which the creditor is entitled to claim the value of it, are subject to the rules contained in the foregoing articles in so far as they can be made to apply.—[III. 139.]

TITLE THIRTEENTH.

OF TRANSACTION.

1918. Transaction is a contract by which the parties terminate a lawsuit already begun, or prevent future litigation by means of concessions or reservations made by one or both of them. —ff. L. 1, de trans.; Cod. L. 2, L. ult. e. t.; Dom. l. 1 t. 13, s. 1, n. 1; 1 Pi. 8; Tr. Trans. n. 4; Dur. 391; 6 Zach. 83; C. C. V. 1525; C. L. 3038; C. N. 2944. [III. 139.]

1919. Those persons only can enter into the contract of transaction who have legal capacity to dispose of the things which are the object of it.—ff. L. 9, § 3, de trans; Cod. L. 36, e. t.; Guy. Trans. § 1; L. & B. lot. C. n. 4; 18 Dur. 407 --; C. L. 3039; C. N. 2045. [III. 139.]

1920. Transaction has between the parties to it the authority of a final judgment, (*res judicata*).—Cod. L. 2, L. 20, De trans.; Dom. l. c. n. 9; C. N. 2052. [III. 141.]

1921. Error of law is not a cause for annulling transaction. With this exception, it may be annulled for the same causes as contracts generally; subject nevertheless to the provisions of the articles following.—ff. L. 9, § 2, De trans.; Cod. L. 19, e. t.; Dom. l. c. s. 2, n. 1 --; Guy. l. c. 243, 244; C. N. 2053. [III. 141.]

1922. Transaction may also be annulled when it is made in execution of a title which is null, unless the parties have expressly referred to and covered the nullity.—Lac. Transaction, n. 7; Car. l. 10, rép. 32; C. 1214; 6 Toul. 71-73; C. N. 2054. [III. 141.]

1923. [Transaction upon a writing which has since been found to be false, is altogether null.]—Cod. L. pen., De trans.; Lac. l. c.; Dom. l. c. n. 4; 3 Delv. 137; 18 Dur. n. 429; C. N. 2055. [III. 141.]

1924. Transaction upon a suit terminated by a judgment having the authority of a final judgment, and not known to either of the parties, is null. But if the judgment be appealable the transaction is valid.—ff. L. 7, L. 11, De trans.; Cod. L. 32, e. t.; Dom. l. c. n. 7; Guy. l. c. § 2, 236, 237; C. N. 2056. [III. 141.]

1925. When parties have transacted generally upon all the matters between them, the subsequent discovery of documents of which they were then in ignorance does not furnish a cause for annulling the transaction; unless such documents have been kept back by one of the parties.—But transaction is null when it relates only to an object respecting which the newly discovered documents prove that one of the parties had no right whatever.—Cod. L. 19, L. 29, De trans.; Dom. l. c. n. 3; Lac. l. c. n. 3; 18 Dur. 433; C. N. 2057. [III. 141.]

1926. Errors of calculation in transaction may be reformed. —Cod. L. unic., De err. calc.; C. N. 2058. [III. 141.]

TITLE FOURTEENTH.

OF GAMING CONTRACTS AND BETS.

1927. There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet. But if the money or thing have been paid by the losing party he cannot recover it back, unless fraud be proved.—ff. L. 2, fin., De aleat.; Poth. Jeu, n. 49, 50, 53; Tr. Cont. aléat. on a. 1965, 1966; Sm. Con. 188; Oli. 212; McKenna vs. Robinson, 3 M. & W. 441; C. N. 1965, 1967. [III. 141.]

1928. The denial of the right of action declared in the preceding article is subject to exception in favor of exercises for promoting skill in the use of arms, and of horse and foot races, and other lawful games which require bodily activity or address.—Nevertheless the court may in its discretion reject the action when the sum demanded appears to be excessive. — Author. under a. 1927; C. N. 1966. [III. 143.]

TITLE FIFTEENTH.

OF SURETYSHIP.

CHAPTER FIRST.

OF THE NATURE, DIVISION, AND EXTENT OF SURETYSHIP.

1929. Suretyship is the act by which a person engages to fulfil the obligation of another in case of its non-fulfilment by the latter.—The person who contracts this engagement is called surety.—Poth. Ob. n. 365; 18 Dur. n. 295, p. 289; 2 Guy. Caution, 764; 4 N. D. Cautionnement, 318. [III. 143.]

1930. Suretyship is either conventional, legal, or judicial. The first is the result of agreement between the parties, the second is required by law, and the third is ordered by judicial authority. — Poth. Oblig. n. 386; 3 Dem. n. 763, p. 364. [III. 143.]

1931. The surety is not bound to fulfil the obligation of the debtor unless the latter fails to do so.—C. N. 2011; Inst. l. 13, t. 22, ff. L. 1, § 8, de ob. et

act.; Poth. Ob. n. 366, 368, 387; 14 P. Fr. 269 --. [III 143.]

1932. Suretyship can only be for the fulfilment of a valid obligation.—It may however be for the fulfilment of an obligation which is purely natural or from which the principal debtor may free himself by means of an exception which is purely personal to himself; for example, in the case of minority.—ff. L. 78, De reg. jur. L. 29, De fid.; Poth. Ob. 194, 367, 377, 396; C. L. 3005; C. N. 2012. [III. 143.]

1933. Suretyship cannot be contracted for a greater sum nor under more onerous conditions than the principal obligation.—It may be contracted for a part only of the debt or under conditions less onerous. —The suretyship which exceeds the debt, or is contracted under more onerous conditions, is not null; it is only reducible to the measure of the principal obligation.—ff. L. 8, De fid. et mand.; Cod. L. 22, 70, e. t.; Poth. Ob. 369, 371, 374-376; C. L. 3006; C. N. 2013. [III. 143.]

1934. A person may become surety without the request and even without the knowledge of the party for whom he binds himself.—A person may become surety not only of the principal debtor but even of the surety of such debtor.—ff. L. 30, De fid. et mand.; Arr. Lam. t. 23, a. 8; 2 Rog. 2622; Poth. Oblig. 366, 394, 399, 404; 4 Bous. 578-9; C. L. 2015. [III. 143.]

1935. Suretyship is not presumed; it must be expressed, and cannot be extended beyond the limits within which it is contracted.—Poth. Ob. 401-3-5; Cod. L. 6, de fid. et mand.; 4 Bous. 579; 2 Rog. 2623; C. L. 3008; C. N. 2015. [III. 145.]

1936. Indefinite suretyship extends to all the accessories of the principal obligation, even to the costs of the principal action, and to all costs subsequent to notice of such action given to the surety.—Poth. Ob. n. 404-6; Merl. Caution, § 1, n. 3; ff. L. 52, 58, de fid. et mand.; Ser. Inst. 485 i. f.; 2 Rog. 2624; 4 Mal. 93, 4; 4 Bous. 580; O. 1667, t. des garants, a. 14; C. L. 3009; C. N. 2016. [III. 145.]

1937. The obligations of the surety pass to his heirs, except the liability to coercive imprisonment when the obligation of the surety was such that he would have been subject to it.—Inst. l. 3, t. 21, § 2; ff. L. 4, 5, de fid. et mand.; Cod. e. t.; 2 Rog. 2624; 4 Mal. 94; 4 Bous. 581; C. N. 2017. [III. 145.]

1938. The debtor who is bound to find a surety must offer one who has the capacity of contracting, who has sufficient property in Lower Canada to answer the obligation, and whose domicile is within the limits of Canada.—ff. L. 3, De fid. et mand.; 2 Rog. 2625; Arr. Lam. t. 23, a. 5; Poth. Ob. n. 388, 391; 4 Bous. 581-3; 4 Mal. 94; 14 P. Fr. 281 --; Rod. on O. 1667. p. 578; Bor. on do. t. 28, a. 3; C. L. 3011; C. N. 2018. [III. 145.]

1939. The solvency of a surety is estimated only with regard to his real property; except in commercial matters, or when the debt is small, and in cases otherwise provided for by some special law.—Litigious immoveables are not taken into account.—ff. L. 25, De reg. jur.; Poth. Ob. 388, 391; 4 Bous. 583; Fen. Poth. 630; Ser. Inst. 484; 4 Mal. 94, 95--; C. N. 2019. [III. 145.]

1940. When the surety, in conventional or judicial suretyship, becomes insolvent, another must be found.—This rule admits of exception in the case only in which the surety was solely given in virtue of an agreement by which the creditor has required that a certain person should be the surety.—ff. L. 3, de fid. et mand, L. 10, qui satisdare cogantur; Poth. Ob. 392; 14 P. Fr. 285--; 4 Mal. 95--; 4 Bous. 584--; 2 Rog. 2626--; C. L. 3012; C. N. 2020. [III. 145.]

CHAPTER SECOND.

OF THE EFFECT OF SURETYSHIP.

SECTION I.

Of the effect of suretyship between the creditor and the surety.

1941. The surety is liable only upon the default of the debtor, who must previously be discussed, unless the surety has renounced the benefit of discussion, or has bound himself jointly and severally with the debtor, in which case his liability is governed by the rules established with respect to joint and several obligations.—Nov. 4, c. 1, 2; 1 Coch. 649--; Arr. Lam. t. 23, a. 17; 4 Bous. 585--; Poth. Ob. 407-9, 413, 417; C. L. 3014; C. N. 2021. [III. 147.]

1942. The creditor is not bound to discuss the principal debtor unless the surety demands it when he is first sued.—D'Ol. t. 4, c. 22; Ser. 483; Poth. Ob. 411; Merl. Caution, § 4, n. 1; 2 Rog. 2628--; Dard, 457, on a. 2022; C. L. 3015; C. N. 2022. [III. 147.]

1943. The surety who demands the discussion must point out to the creditor the property of the principal debtor and advance the money necessary to obtain the discussion.—He must not indicate property situated out of Lower Canada, nor litigious property, nor property hypothecated for the debt and no longer in the hands of the debtor.—Nov. 4, c. 2; Poth. Ob. 412-4, Hyp. c. 2, s. 1, a. 2, § 3; Arr. Lam. t. 24, a. 9; 2 Rog. p. 2630; 4 Bous. 588--; C. L. 3016; C. N. 2023. [III. 147.]

1944. Whenever the surety has indicated property in the manner prescribed by the preceding article, and has advanced sufficient money for the discussion, the creditor is, to the extent of the value of the property indicated, responsible as regards the surety, for the insolvency of the principal debtor which occurs after his default to proceed against him.—C. Br. a. 192; 2 Hen. c. 4, q. 34; Poth. Ob. 415; 2 Rog.

2630 --; 4 Mal. 99, 100; 4 Bous. 591, 2; Fen. Poth. 632, 3; 14 P. Fr. 289; Dard, 458, on a. 2026; C. L. 3017; C. N. 2024. [III. 147.]

1945. When several persons become sureties of the same debtor for the same debt, each of them is bound for the whole debt.—ff. L. 11, De duobus reis const.; Cod. L. 3, De fid. et mand.; Inst. l. 3, t. 21, § 4; Vin. l. 11, c. 40; Ser. 483; Poth. Ob. 416, 535; 4 Bous. 592; C. L. 3018; C. N. 2025. [III. 147.]

1946. Nevertheless each of them may, unless he has renounced the benefit of division, require the creditor to divide his action and reduce it to the share and proportion of each surety.—If, at the time that one of the sureties obtained judgment of division, some of them were insolvent, such surety is proportionately liable for their insolvency; but he cannot be made liable for insolvencies happening after the division.—ff. L. 10, de fid.; Inst. l. 3, t. 21; Poth. Ob. 416, 417, 425, 426, 535; 2 Rog. 2631; 4 Mal. 101; 4 Bous. 593--; C. L. 3018, 3019; C. N. 2026. [III. 147.]

1947. If the creditor have himself voluntarily divided his action, he can no longer recede from such division, although at the time some of the sureties had become insolvent.—Cod. L. 16, De fid.; Poth. Ob. 421, 427; 4 Mal. 101, 2; 4 Bous. 596; 14 P. Fr. 294, *n.* 1; C. L. 3019; C. N. 2027. [III. 147.]

SECTION II.

Of the effect of suretyship between the debtor and the surety.

1948. The surety, who has bound himself with the consent of the debtor, may recover from him all that he has paid for him in principal, interest and costs, together with the costs incurred against him and those legally incurred by him in notifying the debtor and subsequently to such notification. He has also a claim for damages, if there be ground for it.—ff. L. 10, L. 11, mand.; Cod. L. 18, mand.; Poth. Ob. 365, 429-433, 437, 440-3; Merl. Intérêt, § 2, n. 10; 4 Mal. 102; 4 Bous. 597; C. L. 3021; C. N. 2028. [III. 147.]

1949. The surety, who has bound himself without the consent of the debtor, has a remedy for what he has paid beyond what the debtor would have been obliged to pay had the suretyship not been entered into, saving the costs subsequent to the notice of payment by the surety, which are borne by the debtor.—The surety has also his recourse for such damages as the debtor would have been liable for in the absence of such suretyship. [III. 149.]

1950. The surety who has paid the debt is subrogated in all the rights which the creditor had against the debtor.—ff. L. 17, de fid., L. 95, de solut., ff. L. 39, de fid.; Poth. Ob. 428, 430; May. l. 2, c. 49; D'Ol. l. 4, c. 31; Cat. l. 5, c. 49; 2 Vin. Inst. 733; Lar. Arr. l. 6, t. 20, a. 4, 333; Merl. Subro-

gation de personnes, s. 2, § 5, n. 1; 14 P. Fr. 295; Fen. Poth. 634; 2 Rog. 2632; 4 Mal. 102, 103; 4 Bous. 598 --; C. 1156; C. L. 3022; C. N. 2029. [III. 149.]

1951. When there are several principal debtors jointly and severally bound to the same obligation, the surety who has become answerable for all of them, has his remedy against each of them for the recovery of all that he has paid.—Poth. Ob. 441; 4 Bous. 599 --; 3 Delv. 144; 14 P. Fr. 295; Dard, 459, on a. 2030, *n.* a.; C. L. 3023; C. N. 2030. [III. 149.]

1952. The surety who has paid first has no remedy against the principal debtor who has paid a second time without being notified of the first payment; saving his right to recover back from the creditor.—When the surety has paid before being sued and has not notified the principal debtor, he loses his remedy against such debtor if, at the time of the payment, the latter had the means of having the debt declared extinct; saving his right to recover back from the creditor.—ff. L. 29, § 3, L. 10, § 2, Mand.; Poth. Ob. 433-439; 4 Mal. 103; 4 Bous. 602; 3 Delv. 145; C. L. 3024. 3025; C. N. 2031. [III. 149.]

1953. The surety who has bound himself with the consent of the debtor may, even before paying, proceed against the latter to be indemnified:

1. When he is sued for the payment;

2. When the debtor becomes bankrupt or insolvent;

3. When the debtor has obliged himself to effect his discharge within a certain time;

4. When the debt becomes payable by the expiration of the stipulated term, without regard to the delay given by the creditor to the debtor without the consent of the surety;

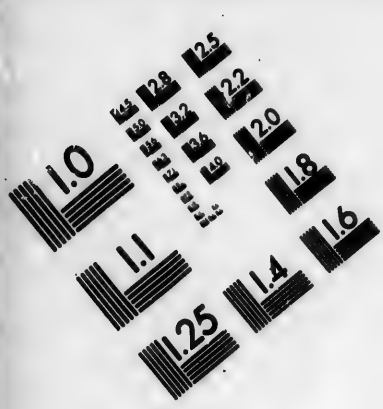
5. After ten years, when the term of the principal obligation is not fixed, unless the principal obligation, such as that of a tutor, is of a nature not to be discharged before a determinate period. — ff. L. 18, Mand.; Bas. pt. 2, c. 5; Poth. Ob. 429, 442; 4 Bous. 602 --; 4 Mal. 104, 105; 3 Delv. 145; Scr. 482; C. L. 4026; C. N. 2032. [III. 149.]

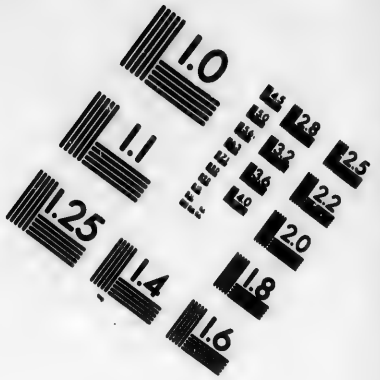
1954. The rule contained in the last paragraph of the preceding article does not apply to sureties given by public officers, or other employees, in order to secure the fulfilment of the duties of their office; such sureties have a right at all times to free themselves from future liability under their suretyship by giving sufficient notice unless it has been otherwise agreed. [III. 151.]

SECTION III.

Of the effect of suretyship between co-sureties.

1955. When several persons become sureties for the same debtor and the same debt, the surety who discharges the debt has his remedy against the other sureties, each for an equal share.—But he can only exercise this remedy when his





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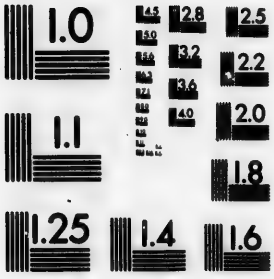

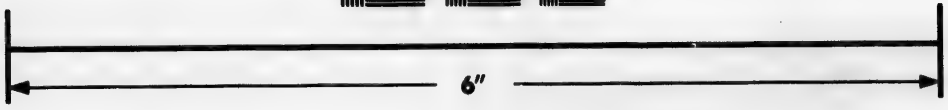

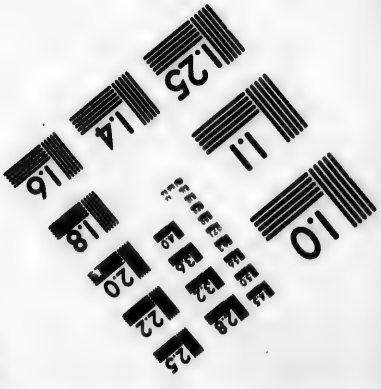

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payment has been made in one of the cases specified in article 1953.—Darg. on a. 203; C. Br. a. 194; Ser. 484; Poth. Ob. 446; 3 Delv. 139, 146; 4 Mal. 105, 6; 4 Bous. 605, 6; 14 P. Fr. 297, 8; 2 Rog. 2635; Dard, on a. 2033; C. L. 3027; C. N. 2033. [III. 151.]

CHAPTER THIRD.

OF THE EXTINCTION OF SURETYSHIP.

1956. Suretyship becomes extinct by the same causes as other obligations.—Cod. L. 4, de fid.; Poth. Ob. 378-380, 407; 4 Mal. 106; 4 Bous. 607, 8; 3 Delv. 146; 2 Rog. 2635; C. L. 3028; C. N. 2034. [III. 151.]

1957. The confusion which takes place in the person of the principal debtor or of his surety when one of them becomes heir of the other, does not destroy the action of the creditor against the surety of such surety.—ff. L. 38, L. 93, de solut. et liber.; Cod. L. 28, c. t.; Poth. Ob. 384, 407; 4 Bous. 608 --; 3 Delv. 146; C. L. 3028; C. N. 2035. [III. 151.]

1958. The surety may set up against the creditor all the exceptions which belong to the principal debtor and are inherent to the debt; but he cannot set up exceptions that are purely personal to the debtor. —ff. L. 32, de fid., L. 7, L. 19, de excep.; Cod. L. 11, c. t.; Inst. l. 4, t. 14, § 4; Poth. Ob. 381-3; Merl. Autorisation maritale, s. 3, § 2, Caution, § 4, n. 3; 4 Mal. 106, 7; Fer. Poth. 637, 8; 4 Bous. 608-9; 14 P. Fr. 299; C. L. 3029; C. N. 2036. [III. 151.]

1959. The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypotheces and privileges of such creditor.—ff. Arg. ex lege 95, § 11, de solut. et liber.; Poth. Ob. 407, 557; 4 Mal. 107; 4 Bous. 612; 3 Delv. 146; 14 P. Fr. 300; C. L. 3030; C. N. 2037. [III. 151.]

1960 When the creditor voluntarily accepts an immoveable or any object whatever in payment of the principal debt, the surety is discharged, though such creditor should afterwards be evicted of it.—ff. Arg. ex lege 54, de solut., L. 54, c. t., L. 47, de verb. sig., L. 62, de pact.; Poth. Ob. 407; 4 Mal. 107, 8; 4 Bous. 613; 3 Delv. 147; 14 P. Fr. 300, n. 2; 2 Rog. 2648 --; Dard. 462, n. a.; C. L. 3031; C. N. 2038. [III. 151.]

1961. The surety who has become bound with the consent of the debtor is not discharged by the delay given to such debtor by the creditor. He may in the case of such delay sue the debtor in order to compel him to pay.—Vin. q. 11, 42; Poth. Ob. 407; Arr. Lam. t. 23, a. 13; Merl. Novation, § 6; 1 Desp. 608, n. 8; 4 Mal. 108; 4 Bous. 613; 3 Delv. 145, 7; Dard, p. 462, n. b.; 3 Rev. 296; C. L. 3032; C. N. 2039. [III. 153.]

CHAPTER FOURTH.

OF LEGAL AND JUDICIAL SURETYSHIP.

1962. Whenever a person is required by law or by order

of a court to find a surety, he must conform to the conditions prescribed by articles 1938, 1939 and 1940.—In the case of judicial suretyship, the person offered must moreover not be exempt from civil imprisonment.—L. & B. let. F. c. 23; Ser. 483; Poth. Ob. 377, 387, 391, 403; Bor. O. 1667, t. 28, a. 4; Id. O. 1669, t. 6, a. 11; Rod. 271; Merl. Caution, § 1, n. 8; 4 Mal. 108; Ser. 483; 4 Bous. 614, 5; 3 Delv. 141; 14 P. Fr. 301; C. L. 3033; C. N. 2040. [III. 153.]

1963. When a person cannot find surety he may in lieu thereof deposit some sufficient pledge.—ff. Arg. ex lege 58, § 6, mand. vel contrar. L. 25, De reg. jur.; Arr. Lam. t. 23, a. 17; Poth. Ob. 393; 2 Proud. n. 848; 4 Bous. 141; 3 Delv. 141; C. L. 3034; C. N. 2041. [III. 153.]

1964. A judicial surety cannot demand the discussion of the principal debtor.—ff. L. 1, judicatum solvi; Cod. L. 3, de usuris rei judic.; Lebret, plaid. 42; Bas. Hyp. c. 4, a. 17; Ser. 83; Lap. let. D. n. 38; Lac. Caution, s. 2, n. 1; Poth. Ob. 409, 417; 4 Bous. 615, 6; 4 Mal. 109; 3 Delv. 143; Arr. Lam. t. 23, a. 17; C. L. 3035; C. N. 2042. [III. 153.]

1965. He who is simply surety of a judicial surety cannot demand the discussion of the principal debtor nor of the surety.—Ser. 83; Lap. let. D. n. 38; Lac. Caution, s. 2, n. 1; 4 Mal. 109; 4 Bous. 616; O. 1667, t. 17; 2 Rog. 2653; C. L. 3036; C. N. 2043. [III. 153.]

TITLE SIXTEENTH.

OF PLEDGE.

1966. Pledge is a contract by which a thing is placed in the hands of a creditor, or, being already in his possession, is retained by him with the owner's consent, in security for his debt.

The thing may be given either by the debtor or by a third person in his behalf.—Domat, l. 3, t. 1, s. 1, n. 1; Pothier, Nantissement, a. prélim. Story, Bailments; n. 286; C. N. 2071, 2077. [III. 153.]

CHAPTER FIRST.

OF THE PLEDGE OF IMMOVEABLES.

1967. Immoveables may be pledged upon such terms and conditions as may be agreed upon between the parties. If no special agreement be made, the fruits are imputed first in payment of interest upon the debt and afterwards upon the principal. If no interest be payable the imputation is made wholly upon the principal.—

The pledge of immoveables is subject to the rules contained in the following chapter, in so far as they can be made to apply.—ff. L. 33, L. 39, De pig. act., L. 11, § 1, De pig. et hyp., L. 50, § 1, De jur. dot. et pass.; Cod. L. 2, L. 3, De pig. act.; Poth. Nan. c. 1, a. 1, § 1; Tr. Nan. 497, 513; 4 Champ. & Rig. 3120. [III. 153.]

CHAPTER SECOND.

OF PAWNING.

1968. The pledging of moveable property is called pawning.

1969. The pawn of a thing gives to the creditor a right to be paid from it by privilege and preference before other creditors.—Poth. Nantiss, n. 26; C. N. 2073. [III. 155.]

1970. The privilege subsists only while the thing pawned remains in the hands of the creditor or of the person appointed by the parties to hold it.—Poth. Nantiss., n. 17, 26; C. N. 2076. [III. 155.]

1971. The creditor cannot, in default of payment of the debt, dispose of the thing given in pawn. He may cause it to be seized and sold in the usual course of law under the authority of a competent court and obtain payment by preference out of the proceeds.—This provision, however, does not apply to banks as regards timber given to them in security under the provisions of the statute 29th Vict. cap. 19.—[The creditor may also stipulate that in default of payment he shall be entitled to retain the thing.]—Cod. L. ult., De pact. pig.; Poth. Nan. n. 19, 24; C. N. 2078. [III. 155.]

1972. The debtor is owner of the thing pledged until it is sold or otherwise disposed of. It remains in the hands of the creditor only as a deposit to secure his debt.—ff. L. 35, § 1, de pig. act.; Cod. L. 9 de pig. et hyp.; C. N. 2079. [III. 155.]

1973. The creditor is liable for the loss or deterioration of the thing pledged according to the rules established in the title *Of Obligations*.—On the other hand, the debtor is obliged to repay to the creditor the necessary expenses incurred by him in the preservation of the thing.—ff. L. 13, § 1, L. 8, L. 25, De pig. act.; Cod. L. 5, L. 6, L. 8, L. 9, L. 27, De pig. et hyp.; C. 1063, 1064, 1150, 1200; C. N. 2080. [III. 155.]

1974. If a debt bearing interest be given in pledge, the interest is imputed by the creditor in payment of the interest due to him.—If the debt for the security of which the pledge is given do not bear interest, the imputation of the interest of the debt pledged is made upon the capital of the former.—ff. L. 1, L. 2, L. 3, De pig. act., L. 5, § 2, 3, de sol. et lib.; Poth. Nan. c. 1, a. 1, § 1, n.; C. N. 2081. [III. 155.]

1975. The debtor cannot claim the restitution of the thing given in pledge, until he has wholly paid the debt in principal, interest and costs; unless the thing is abused by the creditor.—If another debt be contracted after the pledging of the thing and become

due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid.—Cod. L. 1, etiam ob chir.; Poth. Nan. n. 47; Tr. Nan. 462, 463; C. N. 2082. [III. 157.]

1976. The pledge is indivisible although the debt be divisible. The heir of the debtor who pays his portion of the debt cannot demand his portion of the thing pledged while any part of the debt remains due.—Nor can the heir of the creditor who receives his portion of the debt restore the thing pledged to the injury of those of his coheirs who are not paid.—ff. L. 8, § 2, L. 9, § 3, L. 11, § 4, de pig. act.; Poth. Nan. n. 43-45; C. N. 2083. [III. 157.]

1977. The rights of the creditor in the thing pledged to him are subject to those of third parties upon it, according to the provisions contained in the title *Of Privileges and Hypothecs.*—[III. 157.]

1978. The rules contained in this chapter, are subject in commercial matters to the laws and usages of commerce.—[III. 157.]

1979. The special rules relating to the trade of pawnbroking are contained in an act intitutled: *An act respecting pawnbrokers and pawnbroking.*—Special provision is made in chapter 54 of the Consolidated Statutes of Canada for the transfer by endorsement of bills of lading, specifications of timber and receipts given by warehousemen, millers, wharfingers, masters of vessels or carriers, to incorporated or chartered banks, or to private persons, as collateral security, and for the sale of the merchandise and effects represented by such instruments.—C. S. C. c. 61. [III. 157.]

TITLE SEVENTEENTH.

OF PRIVILEGES AND HYPOTHECS.

CHAPTER FIRST.

PRELIMINARY PROVISIONS.

1980. Whoever incurs a personal obligation, renders liable for its fulfilment all his property, moveable and immoveable, present and future, except such property as is specially declared to be exempt from seizure.—Poth. P. C. 174; 1 Pi. 597; 1 Tr. Priv. 4; 1 Pont. Priv. 2, 3; C. N. 2092; [III. 157.]

1981. The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference.—ff. L. 28, De reb. auct. jud., L. 1, de jur. fisci, L.

23, § 1, de verb. sig.; 1 Cou. 133, 4; Poth. P. C. 179, 234; Bowie & McKenzie, judgt. in Appeal, 11 July, 1851; C. 1031-1040; C. N. 2093. [III. 157.]

1982. The legal causes of preference are privileges and hypothecs.—Poth. P. C. 234; 1 Pi. 681, 809; C. N. 2094. [III. 157.]

CHAPTER SECOND.

OF PRIVILEGES.

General provisions.

1983. A privilege is a right which a creditor has of being preferred to other creditors according to the origin of his claim. It results from the law and is indivisible of its nature. —ff. L. 32, de reb. auct. jud.; Loy. Of. l. 3, c. 8, n. 87; Guy. Privilége, 689; 1 Pi. 681; Dom. l. 3, t. 1, s. 1, 30; Poth. Hyp. 451, P. C. 234; Pont, Priv. n. 24; C. N. 2095. [III. 159, 383.]

1984. Among privileged creditors preference is regulated by the different qualities of the privileges, or the origin of the claims.—ff. L. 32, de reb. auct. jud.; Poth. P. C. 178, 234, 262; 1 Pi. 681; Guy. Privilége, 689; 1 Tr. Priv. 26; 1 Pont, n. 175; C. N. 2096. [III. 159.]

1985. Privileged claims of equal rank are paid rateably. —ff. l. c.; 1 Pi. 685, 686, 813; Guy. Privilége, 692; Poth. P. C. 262; Dom. l. 3, t. 1, s. 5, n. 2; C. N. 2097. [III. 159.]

1986. Persons who are subrogated in the rights of a privileged creditor may exercise his right of preference.—Such creditor has however a preference, for any remainder due him, over subrogated parties to whom he has not guaranteed the payment of the amount for which they have obtained subrogation.—C. S. L. C. c. 37, s. 26, § 2, 5; C. 1157. [III. 159.]

1987. Persons who are merely subrogated by law in the rights of one and the same privileged creditor are paid rateably.—Ren. Subr. c. 15, n. 9, 14, 15; 2 Bour. 740, n. 190; Poth. P. C. 234; Arr. Lam. t. 21, a. 60; Hér. c. 11, s. 1, n. 16; Gren. Hyp. n. 93, 394; Tr. Priv. n. 379; C. N. 2097. [III. 159.]

1988. The transferees of different portions of a privileged claim are also paid rateably, if their respective transfers have been made without warranty of payment.—Those whose transfers were made with warranty of payment, are preferred to the others; as between themselves, however, regard is had to the date of the notice given of their respective transfers.—9 Cuj. 1137; Ren. Subr. c. 13, n. 30-32; c. 16, n. 6, 15; 2 Fer. C. P. a. 108, § 5 n. 30--, & p. 1213, n. 4, 5, 6; Lem. C. P. p. 149; N. D. Cession, § 2, n. 10, 12; 1 Lam. t. 21, a. 59, 2 Id. p. 130; Poth. P. C. 234; Tr. Priv. 86, 87, 366, 367, 379, 608; Gren. Hyp., n. 93, 2 Id. 227; Dal. R. J. 1858, pt. 2, 108, *n.*; 26 J. P. 403; C. 1160; 7 Toul. n. 171; 5 Zach. 169; 2 Delv. 564; 2 Duv. n. 204, 227, 287. [III. 159.]

1989. The crown has certain rights and privileges resulting from the laws relating to customs, and from other pro-

visions contained in special statutes concerning matters of public administration.—C. S. C. c. 17, s. 10, 11, 14, 41, § 3, 80, 84, c. 19, 23; C. N. 2098. [III. 159.]

1990. The creditors and legatees of a deceased person who are entitled to separation of property, retain, against the creditors of his heirs and legatees, a right of preference and all their privileges upon such property of the succession as may be subject to their claims. —The same right of preference exists in the cases specified in articles 802 and 966.—Dom. l. 1, t. 11; Poth. Hyp. 454-456; 2 Bour. 675; Merl. Privilége, s. 4, § 6, n. 2; C. S. L. C. c. 37, s. 27, § 3; C. 743; C. N. 878, 2111. [III. 159.]

1991. The rule as regards the creditors of a partnership and those of the partners individually, is declared in article 1899 and in *The Insolvent Act of* 1864.—[III. 161.]

1992. Privileges may be upon moveable or upon immoveable property or upon both together.—Dom. l. c. n. 31; 1 Pi. 681-685, 810-814; Poth. P. C. 191, 260; C. N. 2099.—[III. 161.]

SECTION I.

Of privileges upon moveable property.

1993. Privileges may be upon the whole of the moveable property, or upon certain moveable property only.—1 Pi. 681 --; Poth. P. C 192; C. N. 2100. [III. 161.]

1994. The claims which carry a privilege upon moveable property are the following, and when several of them come together they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom:

1. Law costs, and all expenses incurred in the interest of the mass of the creditors;
2. Tithes;
3. The claim of the vendor;
4. The claims of creditors who have a right of pledge or of retention;
5. Funeral expenses;
6. The expenses of the last illness;
7. Municipal taxes;
8. The claim of the lessor;
9. Servants' wages, and sums due for supplies of provisions;
10. The claims of the crown against persons accountable for its moneys. — The privileges specified under the numbers 5, 6, 7, 9 and 10 extend to all the moveable property of the debtor, the others are special, and affect only some particular objects.—[III. 161.]

1995. Law costs are all those incurred for the seizure and sale of the moveable property and those of judicial proceedings for enabling the creditors generally to obtain payment of their claims.—Cod. L. 10, de bon. auct. jud.; Poth. P. C. 170; 1 Pi. 682; 2 Bour. 684; Dom. l. 3, t. 1, c. 5, n. 25; Bac. D. J. 292, 293; 2 Fer. 1367, 1368; Guy. Privilége 689; Cou. 134; C. N. 2101. [III. 161.]

1996. The expenses incurred in the interest of the mass

of the creditors, include such as have served for the preservation of their common pledge.—1 Pi. 683, 684; Poth. P. C. 193; 1 Dur. 40; C. N. 2102. [III. 161.]

1997. Tithes carry with them a privilege upon such crops as are subject to them.—1 Drapier, 35-37; Jouy, Pr. des dixmes, 158-161, 172; 1 Sal. C. des curés, 55; 2 Dur. de Mail. 356; 1 Pr. de la Jan. 225. [III. 161.]

1998. The unpaid vendor of a thing has two privileged rights:

1. A right to revendicate it;

2. A right of preference upon its price.—In the case of insolvent traders, these rights must be exercised within fifteen days after the sale.—ff. L. 19, de contrah. empt.; Inst. § 41, de rer. divis.; C. P. 176, 177; 2 Bour. 688, 669; Tr. Priv. n. 180. [III. 163.]

1999. The right to revendicate is subject to four conditions:

1. The sale must not have been made on credit;

2. The thing must still be entire and in the same condition;

3. The thing must not have passed into the hands of a third party who has paid for it;

4. It must be exercised within eight days after the delivery; saving the provision concerning insolvent traders contained in the last preceding article.—Fer. C. P. 176, n. 19; 2 Bour. 689; 4 A. D. 377, 378; Tr. Priv. n. 194-197; 2 Tr. Vente, 531; C. 1623. [III. 163.]

2000. If the thing be sold pending the proceedings in revendication, or if, when the thing is seized at the suit of a third party, the vendor be within the delay and the thing in the conditions prescribed for revendication, the vendor has a privilege upon the proceeds in preference to all other privileged creditors hereinafter mentioned.—If the thing be still in the same condition, but the vendor be no longer within the delay, or have given credit, he has a like privilege upon the proceeds, except as regards the lessor or the pledgee.—2 Fer. 1325, 1326, 1343, 1367; Poth. Louage, 241-244, Vente, 322 --; 1 Pr. de la Jan. 226; 2 Bour. 688-9; 2 Lam. 151; 2 Rev. 74; Tr. Priv. 159; C. N. 2102. [III. 163.]

2001. Creditors having a right of pledge or of retention rank according to the nature of their pledge or of their claim. This privilege cannot however be exercised, unless the right is still subsisting, or could have been claimed at the time of the seizure, if the thing have been sold.—Poth. Prop. 343, Dép. 74, Vente, 323, 426, Prêt U. 43, L. Mar. 90, Louage, 406, Mand. 59, P. C. 192; C. P. 181, 182; Fer. C. P. 181, n. 1; 2 Gren. Hyp. 298; 18 Dur. 509; Tr. Nantis. 97, 100, 297, 451; C. S. C. c. 28, s. 90, § 3, s. 91; Den. Ac. de Notor. 108, 109; 2 Bour. 691; C. N. 2102. [III. 163.]

2002. Privileged funeral expenses include only what is suitable to the station and means of the deceased, and

are payable out of all his moveable property.—They include the mourning of the widow, within the same restriction.—ff. L. 14, § 1, L. 45, de relig., L. 17, de reb. auct. jud.; Bac. D. J. c. 21, n. 273; 2 Fer. 1367, 1369, 1370; 1 Pi. 682-686; N. D. Frais funéraires; Guy. Privilége, 689; Poth. P. C. 170; 2 Bour. 687; Lac. Frais funéraires; Loy. Off. l. 3, c. 8, n. 23, 50; Tr. Priv. n. 76, 134, 135; 18 R. Wol. 213; C. N. 2101. [III. 163.]

2003. The expenses of the last illness include the charges of the physicians, apothecaries and nurses during the illness of which the debtor died, and are taken out of all the moveable property of the deceased. —[In cases of chronic disease, the privilege avails only for the expenses during the last six months before the decease.] —Poth. P. C. 170; 1 Pi. 645; 2 Bour. 688; Lac. Préférence, 65; Bac. D. J. c. 21, n. 274, & p. 294, 295; Tr. Priv. n. 157 --; 18 R. Wol. 214; C. R. S. 65; C. L. 3167; C. N. 2101. [III. 163.]

2004. The municipal taxes which rank before all other privileged claims hereinafter mentioned, are limited to taxes on persons and personal property imposed by certain municipalities, and taxes to which a like privilege is attached by special statutes.—14, 15 V. c. 123, s. 77, c. 130, s. 1. [III. 165.]

2005. The privilege of the lessor extends to all rent that is due or to become due under a lease in authentic form; if the lease be not in authentic form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year. — 2 Fer. 1367-8, 1323-4, 1384-5; 2 Bour. 685; Poth. C. P. 170, 171, 194; 1 Con. 134; Guy. Privilége, 689; Actes de Notoriété, 15 & 24 Mar. 1702, 20 Isam. 407; 4 L. C. R. 30, 466; C. S. L. C. c. 40, s. 16; C. N. 2102. [III. 165.]

2006. Domestic servants and hired persons are next entitled to be collocated by preference upon all the moveable property of the debtor for whatever wages may be due to them, for a period not exceeding [one year previous to the time of the seizure or of the death.] — Clerks, apprentices and journeymen are entitled to the same preference, but only upon the merchandise and effects contained in the store, shop or workshop in which their services were required, [for a period of arrears not exceeding three months.]—Those who have supplied provisions have likewise a privilege, concurrently with domestic servants and hired persons, for the supplies furnished during the last twelve months.—Dom. l. 3, t. 1, s. 5; 2 Bour. 688; Guy. Priv. 689; Poth. P. C. 172, 3; 1 Pi. 685; Poutré vs. Poutré, Montreal, 31 Mar. 1856; Tr. Priv. 142-4; Pont, Priv. n. 79; C. N. 2101. [III. 165.]

2007. The privileges upon ships, upon their cargo and their freight, are declared in the title *Of Merchant Shipping*.

2008. Other rules concerning the collocation of certain

privileged claims, are to be found in the Code of Civil Procedure.

SECTION II.

Of privileges upon immoveables.

2009. The privileged claims upon immoveables, are hereinafter enumerated and rank in the following order:

1. Law costs and the expenses incurred for the common interest of the creditors;

2. Funeral expenses, such as declared in article 2002, when the proceeds of the moveable property have proved insufficient to pay them;

3. The expenses of the last illness, such as declared in article 2003, and subject to the same restriction as funeral expenses;

4. The expenses of tilling and sowing;

5. Assessments and rates;

6. Seignioral dues;

7. The claim of the builder, subject to the provisions of article 2013;

8. The claim of the vendor;

9. Servants' wages, under the same restriction as funeral expenses.—1 Cou. 152, 3; Poth. Hyp. 451 --; P. C. 231 --; 1 Pi. 810, 814, 685; Hér. c. 11, s. 1, n. 3-5; Gren. on E. 1771, p. 371, 375; C. S. L. C. c. 15, s. 76, c. 18, s. 32, c. 24, s. 56, § 15, c. 37, s. 8, c. 41, s. 50; C. N. 2103, 2104. [III. 165.]

2010. The privilege for expenses of tilling and sowing attaches upon the price of immoveables sold before the harvest is gathered, to the extent only of the additional value given by such tilling and sowing.—Hér. l. c. n. 8; 1 Pi. 685, 810, 814; Poth. P. C. 261. [III. 167.]

2011. The assessments and rates which are privileged upon immoveables are:

1. Assessments for building or repairing churches, parsonages or church-yards; but in cases where an immoveable has been purchased from a person who does not profess the Roman Catholic religion, before it was assessed for such purposes, the privilege for such assessment must rank after the vendor's claim, and all privileges and hypothecs anterior to such purchase;

2. School rates;

3. Municipal rates, of which however only five years of arrears, besides the current year, can be claimed, without prejudice to cases under special statutes establishing a shorter prescription.—These claims are privileged only upon the immoveable specially assessed, and the last two rank concurrently after those mentioned in paragraph 1.—1 Pi. 810; C. S. L. C. c. 18, s. 32, c. 15, s. 76, c. 24, s. 56, § 15, s. 61. [III. 167.]

2012. The privilege for seigniorial dues applies to all arrears of such dues, and extends equally to arrears of rents constituted in commutation of seigniorial dues, for five years only, besides the current year.—1 Pi. 813; Poth. P. C. 261; 1 Cou. 153; C. S. L. C. c. 41, s. 50. [III. 167.]

2013. Builders, or other

workmen, and architects, have a right of preference over the vendor and all other creditors, only upon the additional value given to the immoveable by their works, provided an official statement establishing the state of the premises on which the works are to be made, have been previously made by an expert appointed by a judge of the Superior Court in the district, and that within six months from their completion such works have been accepted and received by an expert appointed in the same manner, which acceptance and reception must be established by another official statement containing also a valuation of the work done; and in no case does the privilege extend beyond the value ascertained by such second statement, and it is reducible to the amount of the additional value which the immoveable has at the time of the sale.—In case the proceeds are insufficient to pay the builder and the vendor, or in cases of contestation, the additional value given by the buildings is established by a relative valuation effected in the manner prescribed in the Code of Civil Procedure.—1 Pi. 810, 811; Poth. P. C. 261; 1 Cou. 153; C. S. L. C. c. 37, s. 26, § 4; C. N. 2103. [III. 167.]

2014. The vendor has a privilege upon the immoveable sold for all the price due to him.—If there have been several successive sales, the prices of which are wholly or partly due, the first vendor is preferred to the second, the second to the third, and so on.—The same right extends: — To donors, for the payments and charges stipulated in their favor;—To copartitioners, coheirs and colegatees upon the immoveables which they owned in common, for the warranty of the partitions made between them and of the differences to be paid.—ff. L. 22, de hered. vel, L. 6, qui. pot., L. 24, § 1, de reb. auct. jud.; Inst. l. 2, t. 1, § 41; Cod. L. 7, qui pot., L. 7, communia utri.; Dom. l. 3, t. 1, t. 5, n. 4, 6 --, Suc. l. 1, t. 4, s. 3; Hér. 203, 204; Poth. Hyp. 454, P. C. 262; 1 Pi. 813; 1 Cou. 153; C. N. 2103. [III. 167.]

SECTION III.

How privileges upon immoveables are retained.

2015. With regard to immoveables, privileges produce no effect among creditors, unless they are made public in the manner determined in the title *Of Registration of Real Rights*, saving the exceptions therein mentioned.—C. S. L. C. c. 37, s. 26, 27, § 1; Tr. Priv. n. 266 --; C. N. 2106. [III. 167.]

CHAPTER THIRD.

OF HYPOTHECS.

SECTION I.

General provisions.

2016. Hypothec is a real right upon immoveables made liable for the fulfilment of an obligation, in virtue of which

the creditor may cause them to be sold in the hands of whomsoever they may be, and have a preference upon the proceeds of the sale in order of date as fixed by this code.—ff. L. 17, de pig.; Poth. Hyp. 417, 427, 433; N. D. Hyp. 741; 16 Lo. 96; Tr. Priv. 388-390; Pont, Priv. 321; C. L. 3245; C. N. 2114, 2118. [III. 169, 385.]

2017. Hypothec is indivisible and subsists in entirety upon all the immoveables made liable, upon each of them and upon every portion thereof.—Hypothec extends over all subsequent improvements or increase by alluvion of the property hypothecated. — It secures besides the principal, whatever interest accrues therefrom, under the restrictions stated in the title *Of Registration of Real Rights*, and all costs incurred.—It is merely an accessory and subsists no longer than the claim or obligation which it secures.—ff. L. 16, de pig.; Dom. l. 3, t. 1, s. 1, n. 7-11, 18, s. 2, n. 4, 5; Poth. Hyp. 431-3; N. D. Hyp. 745-748, 774; C. S. L. C. c. 37, s. 37, 38, 47; C. N. 2114, 2133. [III. 169.]

2018. Hypothec can take place only in the cases and according to the formalities authorized by law.—C. S. L. C. c. 37; C. N. 2115. [III. 169.]

2019. Hypothec may be either legal, judicial, or conventional. — Poth. Hyp. 418; C. S. L. C. c. 37, s. 45-47; C. N. 2116. [III. 169.]

2020. Legal hypothec is that which results from the law alone.—Judicial hypothec is that which results from judgments or judicial acts.—Conventional hypothec results from an agreement. — Poth. Hyp. 418, 420, 423, 424; Dom. l. 3, t. 1, s. 2, n. 47; C. N. 2117. [III. 169.]

2021. Hypothec upon an undivided portion of an immoveable can only subsist in so far as the debtor, by means of a partition or other equivalent act, remains proprietor of some portion of such immoveable, saving the provisions of article 731.—Author. under a. 731. [III. 169.]

2022. Moveables are not susceptible of hypothecation; except as provided in the titles *Of Merchant Shipping* and *Of Bottomry and Respondentia*.—Poth. Hyp. 426; C. S. C. c. 41, s. 24; M. S. A. 1854; C. N. 2119, 2120. [III. 169.]

2023. Hypothec cannot be acquired, to the prejudice of existing creditors, upon the immoveables of persons notoriously insolvent, or of traders within the thirty days previous to their bankruptcy.—C. P. 180; N. D. Hyp. 747, Faillite, 401-5, Fraude, 76, 7; Del. 18 Nov. 1702; A. D. Hyp. n. 45, 46; Tr. Priv. 459; Gren. on E. 1771, 383; Lac. Hyp. n. 4, *n.*; C. S. L. C. c. 37, s. 7; 2 L. C. J. 253; 27, 28 V. c. 17, s. 8; C. Co. 446. [III. 169.]

SECTION II.

Of legal hypothec.

2024. The only rights and claims to which legal hypothec is attached, under the restrictions hereinafter mentioned,

are declared in paragraphs one, two, three and four of this section.—[III. 171.]

2025. Legal hypothec either affects all the immoveables generally, or is limited to some of them only.—Poth. Hyp. p. 418; C. S. L. C. c. 37, s. 45, 46. [III. 171.]

2026. Legal hypothec affects such immoveables only as belong to the debtor and are described in a notice filed and registered, as prescribed in the title *Of Registration of Real Rights*.—C. S. L. C. c. 37, s. 46-48. [III. 171, 385.]

2027. Creditors who acquired a legal hypothec before the thirty-first day of December, one thousand eight hundred and forty one, may nevertheless exercise it upon all the immoveable property held by the debtor at or since the time of the acquisition of such hypothec.—[III. 171.]

2028. Legal hypothecs anterior to the first day of September, one thousand eight hundred and sixty, are governed by the laws in force when they were created.—[III. 171.]

§ 1. *Legal hypothec of married women.*

2029. Married women have a legal hypothec for all claims or demands which they may have against their husbands on account of whatever they may have received or acquired during marriage by succession, inheritance or gift.—Poth. Hyp. 424, C. O. t. 20, n. 18; C. S. L. C. c. 37, s. 46, 48, § 5; C. N. 2121, 2135. [III. 171, 385.]

§ 2. *Legal hypothec of minors and interdicted persons.*

2030. Minors and interdicted persons have a legal hypothec upon the immoveables of their tutors or curators for the balance of the tutorship or curatorship account.—C. S. L. C. c. 37, s. 46; C. N. 2121. [III. 171.]

2031. This hypothec takes place only in the case of tutorships or curatorships conferred in Lower Canada.—Poth. Hyp. 425; N. D. Hyp. 749; 1 Fer. D. 824; C. 265, 6. [III. 171.]

§ 3. *Legal hypothec of the crown.*

2032. The legal hypothec of the crown in cases where it exists, is, like legal hypothec in general, subject to the preliminary provisions of this section.—ff. L. 8, qui pot., L. 28, De jur. fisci, L. 38, § 1, De reb. auct.; Del. Oct. 1648; Dom. l. 3, t. 1, s. 5, n. 19, 20, 22, 23; Guy. Privilége, p. 691, 10°; O. Aug. 1669; Bosq. Préférence; Hér. c. 11, s. 1, n. 11; Poth. Hyp. 425, C. O. t. 20, n. 18; C. S. L. C. c. 37, s. 46, 115; C. N. 2121; C. 2033. [III. 173.]

§ 4. *Legal hypothec of mutual insurance companies.*

2033. There is likewise a legal hypothec in favor of mutual insurance companies upon all the immoveables of each party insured, for the payment of the amounts which he is liable to contribute.—This hypothec is not subject to the restrictions contained in article

2026, but its conditions are regulated by the provisions contained in section 12 of chapter 68 of the Consolidated Statutes for Lower Canada.—[III. 173.]

SECTION III.

Of judicial hypothec.

2034. Judicial hypothec results from judgments rendered by the courts of Lower Canada, either in contested or uncontested cases, and which order the payment of a specific sum of money. Such judgments likewise carry hypothec for interest and costs without specifying the amount thereof, subject to the restrictions contained in the title *Of Registration of Real Rights.*—It also results from any act of suretyship judicially entered into, and from any other judicial act creating an obligation to pay a specific sum of money.—It is subject to the rules contained in article 2026.—O. 1566, a. 53; O. 1667, t. 35, a. 11; Del. 16 July 1566, a. 211; Guen. 729; Hér. 238, 9; 2 Tr. Priv. 134, 146, 7; C. S. L. C. c. 37, s. 47; C. N. 2123. [III. 173, 385.]

2035. Judicial hypothecs acquired before the thirty-first day of December, one thousand eight hundred and forty-one, affect all the property held by the debtor at or since the time at which they were acquired. — Poth. Hyp. 423; Author. under a. 2034. [III. 173.]

2036. Judicial hypothecs acquired between the thirty-first day of December, one thousand eight hundred and forty-one, and the first day of September, one thousand eight hundred and sixty, affect only such property as the debtor possessed at the time when the judgment was rendered or the judicial act performed.—C. S. L. C. c. 37, s. 47; C. N. 2123. [III. 173.]

SECTION IV.

Of conventional hypothec.

2037. Conventional hypothec can only be granted by those who are capable of alienating the immoveables which they subject to it; saving the provisions of special enactments concerning *Fabriques.*—Poth. Hyp. 427; Hér. 221, 2; 1 Fer. D. 820; N. D. Hyp. § 2, n. 8; Tr. Priv. n. 460 --; Pont, Priv. n. 609; C. N. 2124. [III. 173.]

2038. Persons whose right to an immoveable is suspended by a condition, or is determinable in certain cases, or is subject to rescission, can only grant hypothecs upon it which are subject to the same conditions or to the same rescission. —ff. L. 11, § 2, de pig. et hyp., L. 31, de pig.; Poth. Hyp. 427; Hér. 222, 3; A. D. Hyp. 827; C. N. 2125. [III. 173.]

2039. The property of minors and interdicted persons, and that of absentees so long as it is only provisionally held, cannot be hypothecated otherwise than in virtue of judgments, or for the causes and subject to the formalities established by law. — C. N. 2126. [III. 173.]

2040. Conventional hy-

pothec cannot be granted otherwise than by acts in authentic form; except in the cases specified in the following article.—2 Lam. 122; N. D. Hyp. § 3, s. 4; C. S. L. C. c.37, s. 58; C. N. 2127. [III. 175.]

2041. Hypothecs upon lands held in free and common soccage, and those upon lands in the counties of Missisquoi, Shefford, Stanstead, Sherbrooke and Drummond, whatever may be their tenure, may also be created in the form specified in the fifty-eighth section of chapter thirty-seven of the Consolidated Statutes for Lower Canada.—[III. 175.]

2042. Conventional hypothecs are not valid unless the deed specially describes the immoveable hypothecated with a designation of the conterminous lands, of the number or name under which it is known, or of its number upon the plan and book of reference of the registry office, if such plan and book of reference exist.—C. S. L. C. c. 37, s. 45, § 2, s. 74; C. N. 2129. [III. 175.]

2043. A hypothec granted by a debtor upon an immoveable of which he has possession as proprietor, but under an insufficient title, takes effect from the date of its registration if he subsequently obtain a perfect title to it; saving the rights of third parties.—The same rule applies to judgments rendered against a debtor under the same circumstances.—ff. L. 16, § 7, de pig. et hyp.; Dom. l. 3, t. 1, s. 1, n. 20; Poth. Hyp. 410; N. D. Hyp. 746. [III. 175, 385.]

2044. Conventional hypothecs are likewise not valid unless the sum for which they are granted is certain and determined by the deed.—This provision does not extend to life-rents or other obligations appreciable in money, which are stipulated in gifts *inter vivos*.—C. S. L. C. c. 37, s. 45; C. N. 2132. [III. 175.]

2045. Hypothecs created by a will upon immoveables subjected by the testator to certain charges, are governed by the same rules as conventional hypothecs. [III. 175.]

2046. Conventional hypothecs may be granted for any obligation whatever.—ff. L. 5, L. 9, § 1, de pig. act.; Poth. Hyp. 431, 482, C. O. t. 20, n. 27; Dom. l. 3, t. 1, s. 1, n. 32; N. D. Hyp. 747. [III. 175.]

SECTION V.

Of the order in which hypothecs rank.

2047. [As between the creditors, hypothecs heretofore created rank in the order of their respective dates, when none of them have been registered in conformity with the provisions contained in the title *Of Registration of Real Rights*. Hypothecs created hereafter are without effect unless they conform to the provisions of article 2130.]—C. S. L. C. c. 37, s. 1, § 2; Pont, Priv. n. 726; C. N. 2134. [III. 175, 385.]

2048. The creditor who expressly or tacitly consents to the hypothecation in favor of another of the immoveable hypothecated to himself is deemed

to have ceded to the latter his preference; and in such case an inversion of order takes place between these creditors to the extent of their respective claims; but in such manner as not to prejudice intermediate creditors if there be any.—Poth. C. O. t. 20, n. 64; 1 Lam. t. 26, a. 3, 4; 2 Ib. 114, 115; Pont, Priv. n. 334, p. 324, n. 1238; 9 L. C. R. 182. [III. 175.]

2049. A creditor who has a hypothec upon more than one immoveable belonging to his debtor may exercise it upon such one or more of them as he deems proper.—If however all or more than one of the immoveables thus hypothecated be sold, and the proceeds have to be distributed, his hypothec is divided rateably upon so much of their respective prices as remains to be distributed, when there are other subsequent creditors holding hypothecs upon some one or other only of such immoveables.—Merl. Transcription, 129. [III. 177.]

2050. The privileged or hypothecary creditors of a vendor rank before him, regard being had among them to the order of preference or priority. — Poth. Hyp. 454. [III. 177.]

2051. Creditors whose claims are suspended by a condition are nevertheless collocated in their order, subject however to the conditions prescribed in the Code of Civil Procedure.—Dom. l. 3, t. 1, s. 17; Poth. P. C. 263; N. D. Hyp. 746. [III. 177.]

2052. The provisions concerning privileges contained in articles 1986, 1987 and 1988 are also applicable to hypothecs. —1 Tr. Priv. 103. [III. 177.]

CHAPTER FOURTH.

OF THE EFFECT OF PRIVILEGES AND HYPOTHECS WITH REGARD TO THE DEBTOR OR OTHER HOLDER.

2053. Hypothecs do not divest the debtor or other holder, either of whom continues to enjoy the property and may alienate it, subject however to the privilege or the hypothec charged upon it.—ff. L. 9, § 2, de pig. act; Poth. Hyp. 433, 434; N. D. Hyp. 788. [III. 177.]

2054. Neither the debtor nor other holder can, with a view of defrauding the creditor, deteriorate the immoveable charged with a privileged or hypothecary claim, by destroying or injuring, carrying away or selling the whole or any part of the buildings, fences or timber thereon.—C. S. L. C. c. 47, s. 2. [III. 177, 385.]

2055. In the event of such deterioration the creditor who has a privilege or hypothec upon the immoveable may sue him, even though the claim be not yet payable, and recover from him personally the damages occasioned by such deteriorations, to the extent of such claim and with the same right of privilege or hypothec; but the amount so recovered goes in reduction of the claim. C. S. L. C. c. 47, s. 2, § 2;

Pont, Priv. n. 362-365; C. N. 2175. [III. 177.]

2056. Creditors having a registered privilege or hypothec upon an immoveable may follow it into whatever hands it passes and cause it to be sold judicially in order to be paid, according to the order of their claims, out of the proceeds of such sale.—Dom. l. 3, t. 1, s. 3, n. 1-3; Poth. Hyp. 433, 4; N. D. Hyp. 741, 788; C. N. 2166. [III. 177.]

2057. In order to secure his rights, the creditor has two remedies, namely, the hypothecary action and the action to interrupt prescription. The latter is treated of in the title *Of Prescription.* [III. 179.]

SECTION I.

Of the hypothecary action.

2058. The hypothecary action is given to creditors whose claims are liquidated and exigible, against all persons holding as proprietors the whole or any portion of the immoveable hypothecated for their claim.—Cod. L. 24, de pig.; Loy. Déguerp. l. 2, c. 2, n. 3; Poth. Hyp. 434, 5; 6 N. D. 19; Tr. Priv. n. 804. [III. 179.]

2059. When the property is in the possession of an usufructuary the action must be brought against the proprietor of the land and against the usufructuary conjointly, or notice of it must be given to whichever of the two has not been sued in the first instance.—Poth. Hyp. 435; 6 N. D. 20. [III. 179.]

2060. If the possessor be charged with a substitution, judgment may be obtained against him in an hypothecary action without calling in the substitute; saving in such case the right of the latter as declared in the title concerning gifts.—Poth. Sub. 541; C. 959. [III. 179.]

2061. The object of the hypothecary action is to have the holder of the immoveable condemned to surrender it, in order that it may be judicially sold, unless he prefers to pay the debt in principal, interest as secured by registration, and costs.—If the claim be for a rent the holder in order to avoid surrendering must pay the arrears and costs, and consent to continue the payments either by a renewal-deed or by a declaration to that end which the judgment to be pronounced renders effective.—Poth. Hyp. 444; Pont, Priv. 1132. [III. 179.]

2062. The holder against whom an action is brought for the enforcement or for the recognition of a hypothec has a right to call in his vendor, or any previous grantor bound to warrant the property against such claim, in order that he be condemned to intervene and repel the action or to indemnify such holder against the condemnation and any damages that may result therefrom.—C. P. 102; 1 Pi. 573; C. S. L. C. c. 82, s. 32. [III. 179.]

2063. For this purpose the holder who is sued may set up a dilatory exception to the demand, as explained in the

Code of Civil Procedure.—[III. 179.]

2064. The holder may set up against the demand all grounds of defence whatever tending to its dismissal, whether the party bound to warrant the property has been called in or not.—[III. 179.]

2065. The holder against whom the hypothecary action is brought, and who is neither charged with the hypothec nor personally liable for the payment of the debt, may, besides the grounds of defence tending to destroy the hypothec, set up any of the exceptions set forth in the five following paragraphs, if there be grounds for them.—Poth. Hyp. 436. [III. 179.]

§ 1. *Of the exception of discussion.*

2066. If the person who granted the hypothec or those who are personally liable for the payment of the debt possess property, the holder against whom the hypothecary action is brought may, before he can be called upon to surrender, require the creditor to sell the property belonging to the debtors personally bound, provided he indicates such property and advances the money necessary to obtain its discussion.—Poth. Hyp. 436-8; Dom. l. 1, t. 1, s. 3, n. 6; Tr. Priv. n. 796--; 2 L. C. R. 455; C. N. 2170. [III. 179.]

2067. This exception however cannot be set up in respect of immoveables hypothecated for the payment of a rent created for the price of the land.—C. P. 101. [III. 181.]

§ 2. *Of the exception of warranty.*

2068. The holder may repel the hypothecary action, or the action for the recognition of a hypothec, brought against him, when the prosecuting creditor is in any way whatever personally bound to warrant the immoveable against such hypothec.—Poth. Hyp. 440, 1. [III. 181.]

2069. This exception of warranty is equally available if the prosecuting creditor be himself the holder of another immoveable bound for the warranty of the defendant against the hypothec sued upon; the creditor in such case cannot maintain his action unless he previously surrenders the property which he thus holds.—Poth. Hyp. 441, 2. [III. 181.]

§ 3. *Of the exception of subrogation,* (cedendarum actionum.)

2070. The holder who is sued has a right to be subrogated in the rights and claims of the prosecuting creditor against all other persons liable for the payment whether personally or hypothecarily.—Poth. Hyp. 442; C. 1156. [III. 181.]

2071. If the prosecuting creditor or those from whom he derives his claim, have destroyed any right or recourse which the holder might otherwise have exercised in order to be indemnified against the con-

demnation sought for, or have by their own act become unable to transfer the same to him, the action in so far cannot be maintained. — Poth. Hyp. 442, 3; Pont, Priv. n. 1168 and n. 2. [III. 181.]

§ 4. *Of the exception resulting from expenditures.*

2072. The holder against whom the hypothecary action is brought may also demand that the surrender which he may be ordered to make, be subject to his privilege of being paid what has been expended upon the immoveable, either by himself or by such of the persons from whom he derives his claim as are not personally bound to the payment of the hypothecary debt, the whole in conformity with the rules contained in the title *Of Ownership*, and with interest from the day when such expenditures were liquidated.—Poth. Hyp. 439, 440; C. N. 2175. [III. 181.]

§ 5. *Of the exception resulting from a privileged claim or a prior hypothec.*

2073. The holder who has received the immoveable in payment of a privileged debt or of an hypothecary claim prior to that brought against him, or who has paid a prior hypothecary claim, has a right, before being compelled to surrender, to obtain from the party suing him security that the immoveable will bring a sufficient price to ensure the payment of his privileged or prior claim.—Tr. Priv. n. 804, 5. [III. 183.]

SECTION II.

Of the effect of the hypothecary action.

2074. The alienation of an immoveable by the holder against whom the hypothecary action is brought, is of no effect against the creditor bringing the action, unless the purchaser deposits the amount of the debt, interest and costs due to such creditor.—C. S. L. C. c. 47, s. 1. [III. 183.]

2075. The holder against whom the hypothecary action is brought may surrender the immoveable before judgment. If he do not, he may be condemned to surrender it within the usual delay or the period fixed by the court, and in default thereof to pay the plaintiff the full amount of his claim.—The immoveable must be surrendered in the condition in which it then is, subject to the provisions contained in articles 2054 and 2055.—O. 1667, t. 25, a. 3; Poth. Hyp. 445; 1 Pi. 597. [III. 183.]

2076. The holder may be condemned personally to pay the rents, issues and profits which he has received since the service of process, and any damages he may have caused to the immoveable since that time.—Poth. Hyp. 445; C. N. 2175, 2176. [III. 183.]

2077. The surrender and sale are effected in the manner prescribed in the Code of Civil Procedure.—C. N. 2174. [III. 183.]

2078. Servitudes or real rights which the holder had upon the immoveable at the time of his acquisition of it, or which he extinguished during his possession of it revive after the surrender. — Such rights likewise revive in favor of the purchaser when, upon a demand for confirmation of title, he is obliged to deposit the purchase money in order to discharge hypothecs, or becomes evicted by an outbidder.—C. N. 2177. [III. 183.]

2079. The holder surrenders only the occupation and possession of the immoveable, he retains the ownership until the adjudication, and he may at any time before such adjudication stop the effect of the hypothecary judgment and of the surrender, by paying and depositing the full amount of the plaintiff's claim and all costs. —Poth. Hyp. 444-447; Pont, Priv. n. 1136; C. N. 2173. [III. 183.]

2080. Persons bound to warrant the property may likewise, upon paying the hypothecary debt or procuring the extinction of the hypothec, stop the effect of the surrender and have it declared inoperative upon petition or application to the court in which such surrender was made.—Tr. Priv. 826. [III. 183.]

CHAPTER FIFTH.

OF THE EXTINCTION OF PRIVILEGES AND HYPOTHECS.

2081. Privileges and hypothecs become extinct:

1. By the total loss of the thing subject to the privilege or hypothec; by the changing of its nature; by its ceasing to be an object of commerce, saving certain exceptional cases; —ff. L. 8, q. mod. pig.; Dom. l. 3, t. 1, s. 7, n. 8; Poth. Hyp. 461-3; Arr. Lam. t. 26, a. 2; Tr. Priv. n. 889; Pont, Priv. n. 1224.

2. By the determination or legal extinction of the conditional or precarious right of the person who granted the privilege or the hypothec;—ff. l. c; Dom. l. c. n. 8, 10; Poth. Hyp. 464-5; Lam. l. c. n. 1; Tr. Priv. n. 888; Pont, n. 1225.

3. By the confusion of the qualities of privileged or hypothecary creditor and purchaser of the thing charged. Nevertheless if the creditor who has become purchaser be evicted for a cause which is not attributable to himself, the hypothec or the privilege revives;—ff. L. 9, q. mod. pig.; Poth. 463-4; Arr. Lam. l. c. a. 5; Pont, n. 1223.

4. By the express or tacit remission of the privilege or hypothec;—ff. L. 8, § 1, q. mod. pig.; Dom. n. 15; Poth. 467-8; Tr. n. 868; Pont, n. 1231; C. N. 2180.

5. By the complete extinction of the debt to which the privilege or hypothec is attached, and also in the case provided in article 1197;—ff. L. 6, l. c.; Dom. n. 1; Poth. 466; Tr. n. 846 --; Pont, Priv. n. 1226; C. N. 2180.

6. By sheriff's sale, or other sale of like effect, or by forced licitation, saving seigniorial rights and the rents constituted

in their stead; and also by expropriation for public purposes, the creditors in such case retaining their recourse upon the price of the property;—Cod. L. 1, si antiq. cred.; Hér. 148, 265; Poth. Vente, 513, P. C. 233, 255; 1 Pi. 779; C. S. L. C. c. 85, s. 4, § 3, c. 41, s. 54; C. 1590.

7. By judgment of confirmation of title, as provided in the Code of Civil Procedure;—C. S. L. C. c. 36, s. 12, 14; C. N. 2180.

8. By prescription. [III. 185.]

TITLE EIGHTEENTH.

OF REGISTRATION OF REAL RIGHTS.

CHAPTER FIRST.

GENERAL PROVISIONS.

2082. Registration gives effect to real rights and establishes their order of priority according to the provisions contained in this title.—C. S. L. C. c. 37, s. 1, § 2; C. N. 2106, 2134. [III. 185.]

2083. All real rights subject to be registered take effect from the moment of their registration against creditors whose rights have been registered subsequently or not at all. If however a delay be allowed for the registration of a title and it be registered within such delay, such title takes effect even against subsequent creditors who have obtained priority of registration.—C. S. L. C. s. 1, § 2; C. N. 2106, 2134. [III. 187.]

2084. The following rights are exempt from the formality of registration:

1. The privileges mentioned in paragraphs one, four, five, six and nine of article 2009;

2. The original titles by which lands were granted *en fief, en censive, en franc-alleu,* or in free and common soccage;

3. Hypothecs in favor of the crown, created in virtue of the statute 9th Vict., ch. 62;

4. Seigniorial rights, and the rents constituted in their stead;

5. The claim of mutual insurance companies for the amounts which the parties insured are liable to contribute.—C. S. L. C. c. 37, s. 3, § 3, s. 8, 46, 54, c. 24, s. 61, § 10, c. 18, s. 32, c. 15, s. 76, c. 41, s. 50, c. 68, s. 12; 10 L. C. R. 301, Sims vs. Evans; C. N. 2107. [III. 187, 385.]

2085. The notice received or knowledge acquired of an unregistered right belonging to a third party and subject to registration, cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent trader.—C. S. L. C. c. 37, s. 5;

Pont, Priv. n. 728; C. N. 1071. [III. 187, 385.]

2086. Want of registration may be invoked against minors, interdicted persons, married women, and the crown.—C. S. L. C. s. 1, § 2, s. 2, 30, § 1, 2, s. 31, 34, 46, [III. 187, 385.]

2087. Registration may be demanded by minors, interdicted persons, or married women, themselves, or by any person whatever in their behalf.—C. S. L. C. c. 37, s. 32; C. N. 2139. [III. 187.]

2088. The registration of a real right cannot prejudice the purchaser of an immoveable who at the time [and before the coming into force of this code] was in open and public possession of it as owner, even though his title be not registered until afterwards.—C. S. L. C. c. 37, s. 5, § 2. [III. 187.]

2089. The preference which results from the prior registration of the deed of conveyance of an immoveable obtains only between purchasers who derive their respective titles from the same person. — Ib. s. 6; Tr. Transcrip. n. 160 --. [III. 187.]

2090. The registration of a title conferring real rights in or upon the immoveable property of a person, made within the thirty days previous to his bankruptcy, is without effect; saving the case in which the delay given for the registration of such title, as mentioned in the following chapter, has not yet expired.—Ib. s. 7; Tr. Priv. n. 950; C. N. 2146. [III. 187, 385.]

2091. The same rule applies to the registration effected after the seizure of an immoveable, when such seizure is followed by judicial expropriation.—C. N. 2146. [III. 187.]

2092. The registration of real rights must be made at the registry office for the division in which the immoveable affected is either wholly or partly situated.—C. S. L. C. c. 37, s. 14; C. N. 2146. [III. 187.]

2093. Registration avails in favor of all parties whose rights are mentioned in the document presented for that purpose.—C. S. L. C. c. 37, s. 4. [III. 189.]

2094. Privileged claims not registered take effect, as regards other unregistered claims, according to their rank or their date, and are preferred to simple chirographic claims; saving the exceptions contained in articles 2090 and 2091.—C. S. L. C. c. 37, s. 27, § 4; C. N. 2113. [III. 189.]

2095. Registration does not interrupt prescription.—Ib. s. 49, § 3. [III. 189.]

2096. Other provisions concerning registration, both as regards real rights and moveable property and rights, are contained in several other titles of this code. [III. 189.]

2097. The effects of registration or of non-registration in respect of deeds and judgments and other real rights anterior to the different statutes concerning registration are governed by special provisions of law contained in such statutes. —Ib. s. 3, 66, 116. [III. 189.]

CHAPTER SECOND.

RULES PARTICULAR TO DIFFERENT TITLES BY WHICH REAL RIGHTS ARE ACQUIRED.

2098. All acts *inter vivos*, conveying the ownership of an immoveable must be registered at length, or by memorial.—In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.—Registration has the same effect between two donees of the same immoveable.—Every conveyance by will of an immoveable must be registered either at length or by memorial, [with a declaration of the date of the death of the testator.]—[The transmission of immoveables by succession must be registered by means of a declaration setting forth the name of the heir, his degree of relationship to the deceased, the name of the latter, the date of his death, and, lastly, the designation of the immoveable.]—[So long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable are without effect.]—[III. 189.]

2099. Notwithstanding the provisions hereinabove contained, the sale, lease, or transfer of a mining right, if the title be authentic, is preserved and takes effect from its date by means of its registration within sixty days after its date, even though such act be not followed by actual possession. —24 V. c. 31, s. 1, 2. [III. 189.]

2100. Persons conveying immoveables by sale, gift or exchange preserve all their rights and privileges by registering the deed of alienation within thirty days from its date, even against persons registering their rights between the dates of such deed and of its registration.—[The right of the vendor to take back an immoveable sold, in the case of non-payment of the price, does not affect subsequent purchasers who have not subjected themselves to such right, unless the deed in which it is stipulated has been registered as in ordinary cases; nevertheless the vendor in this matter as well as for securing the price has all the advantage of the delay of thirty days.]—Ib. s. 9. [III. 189, 385.]

2101. [All judgments declaring the dissolution, nullity, or rescission of a registered deed of conveyance or other title by which an immoveable has been transmitted, or permitting the exercise of a right of redemption or of revocation, must be registered at length within thirty days after they are rendered.—[III. 68.]

2102. [The action of the vendor to have the sale dissolved by reason of the non-payment of the price, according to article 1536, cannot be brought against third parties, if the stipulation to that effect have not been registered.—The same rule applies to the right

of redemption.] — [III. 68, 385.]

2103. The privilege of the builder dates only from the registration of the statement establishing the condition of the premises, as required in the title *Of Privileges and Hypothecs*, and takes effect against other registered claims by means only of its registration within thirty days after the date of the second statement establishing the valuation and acceptance of the works done. —Ib. s. 26, § 4; s. 27, § 2; C. N. 2110. [III. 189.]

2104. The privilege of co-partitioners, as well for the payment of differences as for the other rights resulting from partition, is preserved by the registration of the deed of partition within thirty days from its date. — Ib. s. 26, § 3; s. 27; C. N. 2109. [III. 189.]

2105. The same delay is allowed coheirs and colegatees for the registration of the rights and privileges accruing to them under acts or judgments of licitation.—Ib. s. 26, § 3. [III. 189.]

2106. Creditors and legatees claiming separation of property preserve a right of preference upon the estate of their deceased debtor, against the creditors of the heirs or legal representatives of the latter, provided they register within six months after the death of their debtor the rights which they have against his succession.—Such registration is effected by means of a notice or memorial specifying the nature and amount of their claims and describing any immoveables affected thereby. —Ib. s. 27, § 3; C. N. 2111. [III. 189, 385.]

2107. [Claims for funeral expenses and expenses of last illness do not retain their privilege upon immoveables unless a memorial of such claims is registered in the manner and within the delay prescribed by the preceding article.]—[III. 70.]

2108. Fiduciary substitutions in respect of immoveables contained in deeds of gift *inter vivos* are subject to the general rules mentioned in article 2098 as regards third parties whose real rights upon such immoveables have been registered.—As regards all other interested parties the registration of substitutions, takes effect according to the provisions contained in the title concerning gifts.—Ib. c. 37, s. 29; O. Mon. s. 57; C. 941; C. N. 1069. [III. 191.]

2109. If the substitution be created by will, it is subject as regards registration to the provisions hereinafter declared with respect to wills.—Ib. c. 37, s. 29. [III. 191.]

2110. All rights of ownership resulting from wills, and all special hypothecs therein declared, are preserved and take their full effect by means of their registration within six months from the death of the testator, if he die within the limits of Canada, or within three years from such decease, if it occur beyond such limits. —C. S. L. C. c. 37, s. 1, § 3, s. 25, 27; C. N. 1000. [III. 191.]

2111. In the case of the

concealment, suppression or contestation of a will, or of any other difficulty, parties interested, who, without negligence or participation on their part, are disabled from effecting its registration within the delay prescribed by the preceding article, may nevertheless preserve their right by registering within the same delay a statement of such contestation or other impediment, and registering the will within six months after it or its probate has been obtained, or after the removal of the impediment.—Ib. s. 25, § 2. [III. 191.]

2112. Nevertheless the registration of the statement mentioned in the preceding article has no retroactive effect unless the will be registered within five years from the death of the testator.—Ib. s. 25, § 3. [III. 191.]

2113. Married men of full age are bound to register, without delay, the hypothecs and incumbrances to which their immoveables are subject in favor of their wives, on pain of punishment as for misdemeanor and of being liable for all damages.—Ib. s. 30; C. N. 2136. [III. 191.]

2114. If the married man be a minor, his father, mother, or tutor, who consented to his marriage, is bound to effect the registration mentioned in the preceding article, on pain of being held liable for all damages in favor of the wife. —Ib. s. 34. [III. 191.]

2115. The legal hypothec of the wife affects the immoveables of her husband by means only of the registration of her debt, right or claim, and such immoveables only as are described and specified in a notice for that purpose, registered either at the same time as the right claimed, or at any time afterwards; and the hypothec dates only from such last mentioned registration.—Ib. s. 32, 46, 48. [III. 191.]

2116. [The right to legal customary dower, cannot be preserved otherwise than by the registration of the marriage certificate with a description of the immoveables then subject to such dower.—As regards immoveables which may subsequently fall to the husband and become subject to customary dower, the right to dower upon such immoveables does not take effect until a declaration for that purpose has been registered, setting forth the date of the marriage, the names of the consorts, the description of the immoveable, its liability for dower and how it has become subject to it.]—[III. 70.]

2117. Tutors to minors, and curators to interdicted persons are bound to register, without delay, the hypothecs to which their real estate is subject in favor of such minors or interdicted persons, under the pains hereinabove declared against married men in article 2113.—Ib. s. 30; C. N. 2136, 2141. [III. 193.]

2118. Subrogate tutors are bound to see that the registration required in favor of the minor is effected, and if they fail to do so are liable for all

consequent damages that may be sustained by such minor.—Ib. s. 31; C. N. 2137. [III. 193.]

2119. [Every notary called upon to make an inventory is bound to see that the tutorships of the minors, or the curatorships of the interdicted persons interested in such inventories are duly registered, and, if necessary, to cause such registration to be effected at the expense of such tutors or curators, before proceeding with the inventory, on pain of all damages.]—[III. 70.]

2120. The hypothec of minors against their tutor or of interdicted persons against their curator affects such immoveables only as are described and specified in the act of tutorship or curatorship, and, in default of such description, such immoveables as are described in a notice for that purpose registered either at the same time as the appointment of the tutor or afterwards; and the hypothec dates only from such registration.—Ib. s. 46, 48. [III. 193.]

2121. The judgments and judicial acts of the civil courts confer hypothecs when they are registered, from the date only of the registration of a notice specifying and describing the immoveables of the debtor upon which the creditor intends to exercise his hypothec.—The same rule applies to all claims of the crown to which any tacit hypothec or privilege is attached by law.—Ib. s. 48. [III. 193.]

2122. Registration of a deed of sale secures to the vendor in the same order of preference as for the principal, the interest for five years generally and that which is due upon the current year.—Ib. s. 37. [III. 193.]

2123. Registration of a deed constituting a life-rent or other rent preserves a preference for the arrears of five years generally and for those which are due upon the current year.—Ib. s. 37, c. 41, s. 50. [III. 193.]

2124. Registration of any other claim preserves the same right of preference for the interest only of two years generally and for such interest as is due upon the current year.—Ib. s. 37; 2 Pont, on a. 2151; C. N. 2151. [III. 193.]

2125. The creditor has a hypothec for the remainder of the arrears of interest or of rent from the date only of the registration of a claim or memorial specifying the amount of arrears due and claimed.—Nevertheless the arrears of interest due at the time of the first registration and therein specified are preserved by such registration.—7 V. c. 22, s. 10; C. S. L. C. c. 37, s. 37, 38; C. N. 2151. [III. 193.]

2126. [Renunciations of dower, of successions, of legacies, or of community of property cannot be invoked against third parties unless they have been registered in the registry office of the division in which the right accrued.]—[III. 70.]

2127. [Every conveyance or transfer, whether voluntary or judicial, of a privileged or

hypothecary claim must be registered in the registry office in which the title creating the debt has been registered.—A duplicate of the certificate of its registration must be furnished to the debtor together with the copy of the transfer. —If these formalities be not observed the conveyance or transfer is without effect against subsequent transferees who have conformed to the above requirements. — All subrogations in such rights granted by authentic deeds or by private writings must likewise be registered and notice thereof be given.—If the subrogation take place by the sole operation of law, it may be registered by transcribing the document from which it results, with a declaration to that effect.—The transfer or subrogation must be mentioned in the margin of the registry of the title creating the debt, with a reference to the number of the entry of such transfer or subrogation.] — [III. 70.]

2128. [The lease of an immoveable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.] —C. 1663. [III. 193.]

2129. [No act containing a discharge from the rent of an immoveable for more than one year in anticipation, can be invoked against a subsequent purchaser unless it has been registered, together with a description of the immoveable.—] 4 R. Vol. 160 —. [III. 193.]

CHAPTER THIRD.

OF THE ORDER OF PREFERENCE OF REAL RIGHTS.

2130. Privileged rights which are not subject to registration take precedence according to their respective rank.—Rights subject to registration and which have been registered within the prescribed delays, take effect according to the provisions contained in the preceding chapter. — Except the above cases and the case of articles 2088 and 2094, real rights rank according to the date of their registration.—If however two titles creating hypothec be entered for registration on the same day and at the same hour they rank together.—If a deed of purchase, and a deed creating a hypothec, both affecting the same immoveable, be entered at the same time, the more ancient deed takes precedence.—[No hypothec has any effect without registration, except that of mutual insurance companies for the amount which the parties insured are liable to contribute.]—C. S. L. C. s. 1, § 2, s. 27, § 4; 9 L. C. R. 298. [III. 195.]

CHAPTER FOURTH.

OF THE MODE AND FORMALITIES OF REGISTRATION.

2131. Registration is effected at length or by memorial.—It may from time to time, without however interrupting prescription, be renewed upon the demand of the creditor or his assigns or of any other

person interested or entitled to demand registration. The renewal is made by transcribing, in a register kept for that purpose, a notice to the registrar designating the document, the date of its original registration, the immoveable affected and the person who is then in possession of it; and the volume and page in which the notice of renewal is registered must be referred to in the margin of the original registration.—If the title were originally registered in another registration division and a copy thereof have not been transmitted to the registry office of the new division, such renewal must mention the place where the title has been so registered.—An index must be kept for the books used for the registration of notices of renewal, and each notice is entered in the index both under the names of the creditor and of the debtor and under that of the owner of the immoveable as given in the notice.—C. S. L. C. c. 37, s. 2. [III. 195, 387.]

SECTION I.

Of registration at length.

2132. Registration at length is effected by transcribing on the register the title or document which creates or gives rise to the right, or an extract from such title made and certified according to the provisions of articles 1216.—Errors of omission or commission in the registration at length of any document or in the document presented for registration do not affect the validity of such registration unless they occur in some material provision which should be noticed in a memorial or in a registrar's certificate.—Ib. s. 2, 18-20. [III. 195, 387.]

2133. The notices mentioned in articles 2026, 2106, 2115, 2116, 2120 and 2121 must be registered at length.—[III. 195.]

2134. Registration at length of an authentic deed may be obtained upon the production of a copy or extract thereof certified by the notary, if he have kept the original of record, or of the original itself, if it have been delivered by the notary.—If the title be a private writing it must be proved in the manner hereinafter prescribed with respect to memorials.—Ib. s. 18, 20-22. [III. 195.]

2135. The certificate of registration at length is written upon the document itself and mentions the day and hour at which it was entered, and the book and page in which it has been so registered, with the number under which it was so entered and registered.—[III. 197.]

SECTION II.

OF REGISTRATION BY MEMORIAL.

2136. Registration by memorial is effected by means of a summary setting forth the real rights which the party interested wishes to preserve, which is delivered to the registrar and transcribed upon the register.—Ib. s. 11; C. N. 2148. [III. 197, 387.]

2137. The memorial must be in writing and may be made at the request of any party interested in or bound to effect the registration, and must be attested by two subscribing witnesses.—The party requiring the memorial must subscribe his name to it, and if he cannot write, his name may be subscribed by another person, provided it be accompanied by the ordinary mark of such party made in the presence of the attesting witnesses.—The memorial may be made on behalf of the crown by the Receiver-General or other officer of the crown in whose hands the document is, and it must state the name, office and domicile of the person by whom it is made.—Ib. s. 11, 13. [III. 197.]

2138. When there are more writings than one to complete the rights of the person requiring registration, they may be all included in one memorial without its being necessary to insert more than once therein the description of the parties or of the immoveables or other property.—Ib. s. 17. [III. 197.]

2139. The memorial must set forth:

1. The date of the title and the name of the place where it was executed;—If it be a notarial act, the name of the notary who keeps the original thereof, or the name of the notaries or of the notary and witnesses who signed it, if the original have been delivered; if it be a private writing the names of the subscribing witnesses; if it be a judgment or other judicial act, it must designate the court;

2. The nature of the title;

3. The description of the creditors and debtors and other parties thereto;

4. The description of the property subject to the right claimed, and that of the party requiring registration;

5. The nature of the right claimed, and, if it be a claim for money, the amount due, the rate of interest, and the costs if there be any.—If the rate of interest be not specified, the registration does not preserve the right to interest beyond the legal rate.—Ib. s. 12. [III. 197.]

2140. The memorial is delivered to the registrar together with the title or document, or an authentic copy of the title, and must be acknowledged by all or one of the parties to it, or be proved by the oath of one of the subscribing witnesses.—Ib. s. 14; C. N. 2148. [III. 197.]

2141. When the memorial is executed in any part of Canada it may be proved in Lower Canada, by the affidavit of one of the witnesses, sworn to before a judge of the Court of Queen's Bench, or of the Superior Court, or a commissioner of the latter court for taking affidavits, or before a justice of the peace, a notary, the registrar, or his deputy.—Ib. s. 15. [III. 197, 387.]

2142. When the memorial is executed in Upper Canada, proof thereof may be there made and attested in the same

manner before a judge of the Court of Queen's Bench or of the Court of Common Pleas, or before a justice of the peace, or a notary, or before a commissioner of the Superior Court for Lower Canada.—Ib. s. 16. [III. 197.]

2143. When it is executed in any other British possession it may be proved therein by an affidavit sworn to before the mayor of the place, the chief justice or a judge of the supreme court, or before a commissioner authorized to take affidavits to be used in the courts of Lower Canada.—Ib. s. 15, § 2. [III. 199.]

2144. If it be executed in a foreign country the affidavit may be sworn to before any minister, or *chargé d'affaires*, or consul of Her Majesty in such foreign state.—Ib. s. 15, 3. [III. 199.]

2145. When any memorial of a title is presented for registration the registrar is bound to endorse upon such title the words "registered by memorial," mentioning the day, the hour and time at which such memorial is entered, and also in what book and page and under what number the same is entered and registered. And he must sign such certificate.—The memorial remains among the records of the registry office and forms part thereof.—Ib. s. 14, § 3, 4. [III. 199.]

2146. Every claim or memorial for the preservation of interest or of arrears of rent must specify the amount thereof and the title under which they are due, [and be accompanied by the affidavit of the creditor that such amount is due.] — Ib. s. 37, 38. [III. 199.]

2147. The provisions of this section apply if necessary to any documents or titles which do not affect immoveables, but the registration of which is required by some special law, unless it be otherwise provided. [III. 199.]

CHAPTER FIFTH.

OF THE CANCELLING OF REGISTRATIONS OF REAL RIGHTS.

2148. The registration of real rights, or the renewal thereof, may be cancelled with the consent of the parties, or in virtue of a judgment from which there is no appeal, or which has become final.—The acquittance of a debt implies a consent to its being cancelled. —Any notary who executes a total or partial discharge of a hypothec is bound to cause the same to be registered in the proper division, according to the statute 27th and 28th Vict. ch. 40.—The creditor is bound to see that the discharge is registered, and is responsible for any costs that may be incurred in consequence of non-registration, and he cannot be compelled to grant a discharge, unless a sufficient sum is placed in his hands to pay for the registration and transmission. — C. S. L. C. c. 37, s. 42; C. N. 2158. [III. 199, 387.]

2149. If the cancelling be not consented to, it may be demanded from the proper court by the debtor or other holder,

by any subsequent hypothecary creditor, by a surety, or by any party interested, together with whatever damages may be due. —Ib. s. 42, 43; 25 V. c. 11, s. 1; C. N. 2159. [III. 199.]

2150. The cancelling is ordered when the registration, or the renewal, has been effected without right or irregularly, or upon a void or informal title, or when the right registered has been annulled, rescinded or extinguished by prescription or otherwise.—Ib. s. 42, 43; C. N. 2160. [III. 199.]

2151. The consent to the cancelling and the acquittance or certificate of discharge may be in authentic form or under private signature.—When under private signature they must be attested by two witnesses, and cannot be received by the registrar unless they are accompanied by an affidavit of one of such witnesses sworn to before one of the functionaries mentioned in articles 2141, 2142, 2143 and 2144, as the case requires, and establishing that the money has been paid in whole or in part, and that such acquittance, certificate of discharge, or consent to the cancelling was signed in the presence of such witness by the party granting it. — The discharge of any hypothec in favor of the crown may be entered in the margin against the registry of such hypothec upon the production of a copy:

1. Of an order of the Governor in Council, certified by the clerk of the Executive Council or his deputy;

2. Or of a certificate of Her Majesty's attorney-general or solicitor-general for Lower Canada, stating that such hypothec is discharged in whole or in part.—The discharge of any hypothec securing a life-rent is entered on the margin upon production of the certificate of death of the person on whose life the rent is created, accompanied by an affidavit identifying such person, and such affidavit may be received and certified by one of the functionaries mentioned in articles 2141, 2142, 2143 and 2144, as the case requires.—Ib. s. 39. [III. 199, 387.]

2152. The consent to the cancelling and the acquittance or certificate of discharge, or the judgment rendered to avail in lieu thereof, must when produced be mentioned in the margin of the registry of the title or memorial establishing the creation or existence of the right so cancelled.—The consent to the cancelling, the acquittance or the certificate of discharge, when they are private writings, or a certified copy thereof when they are in notarial form as well as the copy of any judgment rendered to avail in lieu thereof, registered in conformity with the present article and the succeeding articles of this chapter must remain deposited in the office where such registration takes place.—Ib. s. 39; 25 V. c. 11, s. 1. [III. 201, 387.]

2153. The judgment declaring the nullity, extinction or dissolution of the right registered cannot however be registered, unless it is accom-

panied by a certificate that the delays allowed to appeal from such judgment have expired, without such appeal having taken place.—C. S. L. C. c. 37, s. 43. [III. 201.]

2154. Such judgment must have been served upon the defendant in the usual manner. —Ib. s. 42. [III. 201.]

2155. The sheriff is bound to cause all his deeds of sale of immoveables under execution to be registered, at the expense of the purchaser, as soon as possible, and before delivering to any person whatever any duplicate thereof.—25 V. c. 11, s. 2. [III. 201.]

2156. The prothonotary of the Superior Court is bound to cause to be registered as soon as possible, at the expense of the applicant or the purchaser, as the case may be, all judgments of confirmation of title and all decrees of adjudication upon forced licitation, before delivering copies thereof to any person whatever—25 V. c. 11, s. 2. [III. 201.]

2157. The registration at length of confirmations of title, forced licitations, sheriff's sales, sales in bankruptcy, and other sales having the effect of discharging property from hypothecs, whether made before or after the ninth day of June, one thousand eight hundred and sixty-two, is equivalent to the registration of a certificate of the discharge or of the extinction of all rights which are discharged by such sales, forced licitations or confirmations of title, even of hypothecs for conventional dower; and it is the duty of the registrar in such case to make mention thereof in the margin of each entry establishing a previous right extinguished by such sale, confirmation of title, or decree of adjudication.—25 V. c. 11, s. 3.—[III. 201.]

CHAPTER SIXTH.

OF THE ORGANIZATION OF REGISTRY OFFICES.

SECTION I.

Of registry offices and the registers.

2158. At the chief-place of each county, or in each registration division set apart by law or by proclamation of the governor, a registry office is established for the registration of all real rights affecting immoveables situate within such county or registration division, and of all other acts requiring registration.—C. S. L. C. c. 37, s. 81, 83; C. N. 2146. [III. 201.]

2159. A public officer called a registrar is appointed by the governor to keep such registry office, who is charged to execute the duties prescribed by this title; and every act of fraud which he commits or allows to be committed in the exercise of the duties of his office, subjects him to pay to the party injured triple damages with costs, besides loss of office, and other penalties imposed by law.—Ib. s. 83, 108. [III. 201.]

2160. Registry offices must be kept open every day, Sun-

days and holidays excepted, from nine o'clock in the morning until three o'clock in the afternoon.—Ib. s. 107. [III. 203.]

2161. Every registrar shall keep:

1. An alphabetical index or repertory of the names of all persons mentioned in the acts or documents registered as acquiring or conveying any right affected by such registration, with a reference to the number of the document, and the page of the register in which it is entered, and, when immoveables are concerned, the name of the place where they are situated;

2. An alphabetical list of all parishes, townships, seigniories, cities, towns, villages and extra-parochial places within his registry division, containing a reference under the head of each local division to all entries of documents concerning immoveables comprised within such division, or giving the number and other references mentioned in the preceding paragraph, so as to serve as an index to immoveables, and such list must be made in conformity with the provisions of article 2171;

3. An entry-book in which are entered the year, month, day and hour when each document is brought for registration, the names of the parties to the same and of the person by whom the same is brought, the nature of the right of which registration is required, and a general description of the immoveable affected thereby;

4. A register in which all documents presented for registration are transcribed;

5. A book in which are registered the notices required by articles 2115, 2116, 2120, 2121, with an index to be made in the same manner as the index prescribed in article 2131.—Ib. s. 59, 61-63; C. N. 2202. [III. 203.]

2162. In the registration divisions of Quebec and Montreal the register mentioned in paragraph 4 of the preceding article may be kept in several parts in separate books, according to the following classification:

1. Bonds, recognizances and other securities and obligations in favor of the crown; wills, and the probates thereof;

2. Marriage contracts and gifts;

3. Appointments of tutors and curators; judgments and judicial acts and proceedings;

4. Deeds conveying the ownership of property other than those above mentioned; [the leases mentioned in article 2128, and acquittances for rent paid in anticipation;]

5. Deeds, instruments and writings creating hypothecs, privileges or charges, and not comprised in any of the preceding classes;

6. All other acts of which registration may be required in the interest of any party whatever.—[The foregoing provisions may be extended by a proclamation of the governor to any registry division the population of which exceeds

fifty thousand souls.]—Ib. s. 64. [III. 203, 72.]

2163. The governor may also by proclamation direct that the registrars for the registration divisions of Quebec and Montreal, or either of them, shall keep separate registers and books for the immoveables situate within, and for those situate without the limits of the said cities respectively.—Ib. s. 65. [III. 203.]

2164. The Governor in Council may alter the form of any books, indexes or other official documents to be kept by registrars, or direct new ones to be kept; and all orders to that effect are published in the Canada Gazette and take effect from the day therein appointed, provided such day be not fixed at less than one month from the publication of such order.

2165. Other provisions are contained in the statutes respecting registration.

SECTION II.

Of the official plans and books of reference and of matters connected therewith.

2166. The Commissioner of Crown Lands furnishes each registry office with a copy of a correct plan, made in conformity with the provisions of chapter 37 of the Consolidated Statutes for Lower Canada and the statute 27th and 28th Vict. ch. 40, shewing distinctly all the lots of land of each city, town, village, parish, township, or part thereof, comprised within the division to which such office belongs.—C. S. L. C. c. 37, s. 69, 70. [III. 205.]

2167. Such plan must be accompanied by a copy of a book of reference in which are set forth:

1. A general description of each lot of land shewn upon the plan;

2. The name of the owner of each lot, so far as it can be ascertained;

3. All remarks necessary to the right understanding of the plan.—Each lot of land shewn upon the plan is designated thereon by a number, which is one of a single series, and is entered in the book of reference to designate the same lot.—Ib. s. 69. [III. 205.]

2168. When a copy of the plans and books of reference for the whole of a registration division has been deposited in the office for such division, and notice has been given by proclamation in the manner mentioned in article 2169, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and is sufficient as such in any document whatever; and any part of such lot is sufficiently designated by stating that it is a part of such lot and mentioning who is the owner thereof and the properties conterminous thereto; and any piece of land composed of parts of more than one numbered lot is sufficiently designated by stating that it is so composed and mentioning what part of each numbered lot it contains.—No description of an

immoveable in the notice of application for confirmation of title, or in the notice of a sale by the sheriff or by forced licitation, or of any sale having the effect of a sheriff's sale, or in the sheriff's deed, or in the judgment of confirmation, will be deemed sufficient unless it is made in conformity with the provisions of this article.—As soon as such plans and books of reference have been deposited and notice thereof has been given, notaries passing acts concerning immoveables indicated on such plan are bound to designate such immoveables by the number given to them upon such plan and in the book of reference, in the manner above prescribed; in default of such designation the registration does not affect the lot in question, unless there is filed a requisition or notice indicating the number on the plan and book of reference as being that of the lot intended to be affected by such registration.—Ib. s. 74, § 1-4. [III. 205.]

2169. The deposit of the original plans and books of reference in any registration division is declared by a proclamation from the Governor in Council, fixing at the same time the day on which the provisions of article 2168 shall come into force therein.—Ib. s. 75. [III. 207.]

2170. The registrar so soon as such deposit has been made, must prepare the index to immoveables mentioned in the second place in article 2161.

2171. From and after the day appointed by such proclamation the registrar must, from day to day, make up and continue the index to immoveables by entering under the number of each lot separately designated upon the plan and book of reference a reference to each entry thereafter made in the other books and registers affecting such lot, so as to enable any person easily to ascertain all the entries concerning it made after that time.—Ib. s. 76. [III. 207.]

2172. Within eighteen months after the governor's proclamation bringing the provisions of article 2168 into force in any registration division, the registration of any real right upon any lot of land within such division must be renewed by means of the registry at length, in the book kept for that purpose, of a notice describing the immoveable affected, in the manner prescribed in article 2168 and conforming to the other formalities prescribed in article 2131 for the ordinary renewal of the registration of hypothecs.—An index must be kept for the books used for the registration of the notices mentioned in this article, in the same manner as the index mentioned in article 2131.—Ib. s. 49, 79, § 1, 78. [III. 207.]

2173. If such renewal be not effected, the real rights preserved by the first registration have no effect against other creditors and subsequent purchasers whose claims have been regularly registered.—Ib. s. 77, § 2. [III. 207.]

2174. The registrar cannot in any way correct or alter the

plans or books of reference; and at any time if he find therein errors or omissions in the description or dimensions of any lot or parcel of land, or in the name of the owner, he must report the same to the Commissioner of Crown Lands, who may when the case requires it correct the original and the copy likewise and certify such correction. — Such correction must however be made without changing the number of the lots; and in the case of the omission of a lot it must be inserted by distinguishing it by characters or letters, so as not to interfere with the original numbering.—No right of ownership can be affected by any error in the plan or book of reference, nor can any error of description, dimensions or name be interpreted to give any person any better right to the land than his title gives him.—Ib. s. 71. [III. 205.]

2175. Whenever the owner of a property designated upon the plan or book of reference, subdivides the same into town or village lots [exceeding the number of six,] he must deposit in the office of the Commissioner of Crown Lands a plan and book of reference certified by himself with particular numbers and designations, so as to distinguish them from the original lots, and if the Commissioner of Crown Lands find that such particular plan and book of reference are correct, he shall transmit a copy certified by himself to the registrar of the division.—Ib. s. 80. [III. 205, 72.]

2176. When by reason of the subdivision of the lots in any locality it is deemed necessary, the Governor in Council may from time to time order an amended plan and book of reference to be made out and a copy thereof to be deposited with the registrar of such locality; but such amended plan and book of reference must be based upon and refer to the former ones; and the governor may by proclamation fix the day upon which they will begin to be used together with the former ones; and from and after the day so fixed the provisions of this code shall apply to such amended plan and book of reference.—Ib. s. 79. [III. 207.]

SECTION III.

Of the publicity of the registers

2177. The registrar is bound to deliver to any person demanding the same a statement certified by himself of all the real rights affecting any particular immoveable, or which may affect the whole of any person's property, or of all hypothecs created and registered during a stated period or only against certain proprietors of the immoveable designated in a written requisition to that effect, containing a sufficient description of the owners, in which case the requisition is mentioned in the certificate and the registrar is not responsible for any omission in the certificate resulting from errors or omissions of names in the

requisition; and if such proprietors be not named in the requisition, the registrar is bound to ascertain who were proprietors during the given period in the manner provided with respect to the certificate to be given in cases of sheriff's sales.—C. S. L. C. c. 37, s. 44; 25 V. c. 11, s. 4; C. N. 2196. [III. 207, 387.]

2178. He is bound to deliver, to all persons demanding the same, copies of the acts or documents registered, but he must mention thereon the discharges, cancellations, [conveyances or subrogations] thereof which are entered in such register or in the margin.—C. N. 2199. [III. 207.]

2179. He is also bound to allow all persons desirous of examining the entry-book during his office hours, to take communication of the same without removing it, and free from charge.—He must likewise, upon payment of the lawful fee, exhibit the register to any person who has required the registration of an act and wishes to be assured of such registration.—[III. 209.]

2180. The entries upon the registers and books kept by the registrar must be consecutive without blanks or interlineations.—Every document registered must be numbered and transcribed in the order in which it is produced, and mention must be made in the margin of the register, of the hour, day, month and year when it was deposited in the office for registration.—The registrar is bound, when required to do so, to give the person who presents a document for registration a receipt indicating the number under which such document is entered in the entry-book.—Ib. s. 60, 63, § 2; C. N. 2203. [III. 209.]

2181. Every register for registration must, before any entry is made therein, be authenticated by a memorandum written on the first page thereof and signed by the prothonotary of the Superior Court in the district in which such register is to be used; and such memorandum must contain a certificate stating the purpose for which the register is intended, the number of leaves therein, and the day, month and year in which such memorandum is made; each leaf being numbered in words at length and paraphed by the said prothonotary.—Ib. s. 59; C. N. 2201. [III. 209.]

2182. [The provisions of the preceding article apply equally to the entry-book and to the index to immoveables.] —[III. 74.]

TITLE NINETEENTH.

OF PRESCRIPTION.

CHAPTER FIRST.

GENERAL PROVISIONS.

2183. Prescription is a means of acquiring, or of being discharged, by lapse of time and subject to conditions established by law.—In positive prescription title is presumed or confirmed and ownership is transferred to a possessor by the continuance of his possession.—Extinctive or negative prescription is a bar to, and in some cases precludes, any action for the fulfilment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law.—ff. L. 13, De usurp. et usucap; Poth. Ob. n. 671-6, Pres. n. 1; Guy. Pres. a. 1; Dun. 1, et pas.; C. L. 3421, 3422; C. N. 2219. [I. 509.]

2184. Prescription cannot be renounced by anticipation. That acquired may be renounced, and so may also the benefit of any time elapsed by which prescription is begun.—ff. L. 38, De pac.; Bar. ad L. 58, ff. De leg. n. 20, 21; L. & B. let. P. som. 21, n. 4; Dun. 111, 112; Guy. Pres. s. 1, § 3, a. 1, 2; Poth. Ob. n. 699, C. R. 146, C. O. t. 14, n. 54; Speech of Bigot de Préameneu; 1 Teu. & Sul. 726, n. 7-10; Tr. Pres. n. 42-6; R. de Vil. Pres. n. 476, 7; Marc. Pres. on a. 2220; C. N. 2220. [I. 511.]

2185. Renunciation of prescription is express or tacit. Tacit renunciation results from any act by which the abandonment of the right acquired may be presumed.—Darg. on 226 C. Br., Interruption, c. 5, n. 3; Poth. Ob. 692; Dun. 58, 171; Guy. Pres. s. 1, § 3, a. 2; 1 Teu. & Sul. 731, n. 11, 15; C. N. 2221. [I. 511.]

2186. Persons who cannot alienate cannot renounce prescription acquired.—ff. L. 28, De verb sig.; Poth. Ob. 699, C. R. n. 144-6; C. N. 2222. [I. 511.]

2187. Any person interested in the acquiring of a prescription, may set it up although the debtor or the possessor have renounced it.—ff. L. 19, De except.; Desp. Pres. n. 36, i. f.; Merl. Pres. s. 1, § 4, a. 2; C. N. 2225. [I. 511.]

2188. The court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied.—Poth. Ob. 676; Guy. Pres. s. 1, § 3, a. 3; Merl. e. v. adds to Guy.; Dun. 110; Fer. C. P. t. 6, § 1, n. 15; Car. Q. pt. 1, t. 22, c. 4, i. f., Pand. l. 4. c. 4; Chit. B. 136,; 3 L. C. J. 294, Pigeon & Corporation of Montreal; C. N. 2223. [I. 511.]

2189. Prescriptions in respect of immoveable property are governed by the law of the place where it is situated.—

Poth. Ob. 38, Pres. 247, 248, 251, 253, 254; Voët, P. 44, 3, 11; Dun. 113-4; Bouh. C. B. c. 35, n. 3; Boul. Dissert. q. 3; Stat. obs. 20, p. 364-5, obs. 23, p. 529, 530, obs. 46, p. 488. [I. 511.]

2190. [As regards moveable property and personal actions, even in matters of bills of exchange and promissory notes and commercial matters in general, one or more of the following prescriptions may be invoked:

1. Any prescription entirely acquired under a foreign law, when the cause of action did not arise or the debt was not stipulated to be paid in Lower Canada, and such prescription has been so acquired before the possessor or the debtor had his domicile therein;

2. Any prescription entirely acquired in Lower Canada, reckoning from the date of the maturity of the obligation, when the cause of action arose or the debt was stipulated to be paid therein, or the debtor had his domicile therein at the time of such maturity; and in other cases from the time when the debtor or possessor becomes domiciled therein;

3. Any prescription resulting from the lapse of successive periods in the cases of the two preceding paragraphs, when the first period elapsed under the foreign law.] — 21 Jac. 1, c. 16; C. S. L. C. c. 67, s. 1, c. 64, s. 30, 31; Ros. B. 841-877 & cit.; Sm. Con. 235-237; Sto. Con. § 576-583, § 182 & *n.*; 2 Bing. N. C. 202, 211, Huber vs. Steiner.—[I. 513.]

2191. [Prescriptions commenced according to the law of Lower Canada, are completed according to the same law, without prejudice to the right of invoking those acquired previously under a foreign law, or by a union of periods under both laws, conformably to the preceding article.] [I. 513.]

CHAPTER SECOND.

OF POSSESSION.

2192. Possession is the detention or enjoyment of a thing or of a right, which a person holds or exercises himself, or which is held or exercised in his name by another.—Poth. Pos. n. 1, 37, 49, 54, 61, 63, C. O. t. 22, n. 1, 17; C. N. 2228. [I. 513.]

2193. For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor.—C. P. 113, 114, 118; Poth. Pres. n. 1, 18, 26, 37, 38, 174, 175, Pos. n. 27, 28, 39-41, C. O. t. 14, n. 16, 17, 22; Dun. 20; C. N. 2229. [I. 513.]

2194. A person is always presumed to possess for himself and as proprietor, if it be not proved that his possession was begun for another.—Darg. C. Br. a. 265, c. 5, n. 17; Poth. Pres. 172 i. f., C. O. t. 14, n. 17; Dun. 22. [I. 513.]

2195. When possession is begun for another, it is always presumed to continue so, if there be no proof to the contrary.—ff. L. 3, § 19, De adq. vel amit. pos.; Poth. Pres. 172. [I. 515.]

2196. Acts which are merely facultative or of sufferance cannot be the foundation either of possession or of prescription. ff. L. 41, De adq. vel amit. pos.; Dun. Pres. 15, 85; Guy. Pres. pt. 1, § 6, dist. 5; Lac. Faculté de rachat, n. 1; Author. under a. 2201; C. N. 2232. [I. 515.]

2197. Nor can acts of violence be the foundation of such a possession as avails for prescription.—A. D. Violence; N. D. Clandestinité; Poth. Pos. 19--; C. N. 2233. [I. 515.]

2198. [In cases of violence or clandestinity, the possession which avails for prescription begins when the defect has ceased.—Nevertheless the thief, his heirs and successors by universal title, cannot by any length of time prescribe the thing stolen.]—Successors by particular title do not suffer from these defects in the possession of previous holders, when their own possession has been peaceful and public.—ff. L. 1, § 36, De vi et vi arm.; Poth. Pos. 29. 33, 34, C. O. t. 22, n. 12, 13; Dun. 28--; Tr. Pres. n. 419, 420, 529; C. N. 2233. [I. 515.]

2199. An actual possessor who proves that he was in possession at a former period is presumed to have possessed during the intermediate time, unless the contrary is proved. —Poth. Pres. 178; Dun. 17, 18; C. N. 2234. [I. 515.]

2200. A successor by particular title may join to his possession that of his author in order to complete prescription. Heirs and other successors by universal title continue the possession of their author, saving the case of interversion of title.—ff. L. 14, L. 20, L. 31, § 5, 6, De usurp. et usuc.; Poth. Pos. 31, 33, 34, 63, Dép. 68, Prêt U. 47, C. O. t. 22, n. 14; Delh. r. 248-251; Arr. Lam. t. 29, a. 1; C. N. 2233, 2235, 2237. [I. 515.]

CHAPTER THIRD.

OF THE CAUSES WHICH HINDER PRESCRIPTION, AND SPECIALLY OF PRECARIOUS POSSESSION AND OF SUBSTITUTIONS.

2201. Things which are not objects of commerce cannot be prescribed.—Special provisions explanatory of the present article are to be found in the fourth chapter of this title. ff. L. 9, L. 45, De usurp. et usuc.; Poth. Pres. 7, C. O. t. 14, n. 9; Dun. c. 4, 12, p. 15, 80, 88-91; Delh. r. 285; Hen. l. 4, q. 91; Tr. Pres. n. 112-131; C. N. 2226, 2232. [I. 515.]

2202. [Good faith is always presumed.]—He who alleges bad faith must prove it.—Poth. Pres. 27, 28, 36, 173, 205, Pos. 9, 17, 18, Prop. 244-340; Dun. p. 1, c. 8, & p. 43, 4; Guy. Pres. s. 1, § 5, n. 5; C. N. 2262, 2268. [I. 515.]

2203. Those who possess for another, or under acknowledgment of a superior domain, never prescribe the ownership, even by the continuance of their possession after the term fixed.—Thus emphyteutic lessees, tenants, depositaries, usufructuaries and those who hold precariously the property of another cannot acquire it by

prescription.—They cannot by prescription liberate themselves from the obligation of paying dues attached to their possession, but the measure of such dues and any arrears thereof are prescriptible.—Emphyteusis, usufruct and other like proprietary rights are susceptible of a distinct ownership and of a possession available for prescription. The proprietor is not hindered by the title which he has granted from prescribing against these rights. —He who has been put in definitive possession of the property of an absentee only begins to prescribe against him or his heirs or legal representatives, when such absentee returns or his death becomes known or may be legally presumed.—ff. L. 25, § 1, De adq. vel ami. pos.; Cod. L. 1, Comm. de usuc.; Poth. Prop. 8-12, Dép. 67, Prêt U. 47, Nan. 53, Pos. 13, 15, 31-34, 60, 63, Pres. 27, 43, 44, 172, C. O. t. 14, n. 9, 118, t. 22, n. 10-14; Guy. Pres. p. 308; Proud. D. P. 11, 13, 495, 709, 710, Usufruit, 751-753; Arr. Lam. t. 29, a. 2, 3; Dun. Pres. c. 7; Tr. Pres. 518, 519; C. S. L. C. c. 4, s. 10, § 5, c. 50, s. 1, 6; C. N. 2230, 2239. [I. 517.]

2204. Heirs and successors by universal title of those whom the preceding article hinders from prescribing, cannot themselves prescribe. — Poth. Dép. 67, Prêt U. 47, Pos. 31, 33, 34, 63, C. O. t. 22, n. 14; C. N. 2237. [I. 517.]

2205. Nevertheless the persons mentioned in articles 2203 and 2204 and also persons charged with a substitution, may, if their title have been interverted, begin a possession available for prescription, dating from the information given to the proprietor by notification or other contradictory acts.—Such notification of title and other contradictory acts only avail when made to or in respect of a person against whom prescription can run. — Poth. Pos. 35, C. O. t. 22, n. 14; Guy. Pres. 323-4-5; Dun. 37-38; Tr. on a. 2236, 2238; Marc. on 2236, 2238; Dal. J. G. Pres. p. 256, n. 10, 11, 12; C. N. 2238. [I. 517.]

2206. Subsequent purchasers in good faith, under a translatory title derived either from a precarious or subordinate possessor, or from any other person, may prescribe by [ten years] against the proprietor during such subordinate or precarious holding.—Third parties may also, during a subordinate or precarious holding, prescribe against the proprietor by thirty years with or without title.—Cod. L. 3, § 3, Comm. de leg. et fid.; Th. Des. Sub. 877-911; Fer. C. P. a. 117, p. 409, n. 9, a. 113, gl. 7, n. 19; C. S, L. C., c. 37, s. 1, § 3; Poth. Sub. p. 541, 542, 551, 552; C. S. t. 2, a. 29; C. N. 2230, 2257. [I. 519.]

2207. In cases of substitution prescription does not run against the substitute, before the opening of the right, in favor of the institute, nor of his heirs or successors by universal title.—[Prescription runs against the substitute, before the opening of the right, in

favor of third parties, unless he is protected as a minor, or otherwise. — Any substitute, against whom prescription thus runs, may bring an action to interrupt it.]—The possession of the institute avails the substitute, for the purposes of prescription. — Prescription runs against the institute during the time of his possession and in his favor against third parties.—After the opening, prescription may begin to run in favor of the institute and of his heirs and successors by universal title.—Th. Des. l. c.; 2 Bret. H. l. 4, c. 6, 9, 19, p. 245--; Dun. 269; Fer. C. P. a. 117, p. 410, n. 10; C. N. 2241. [I. 519.]

2208. No one can prescribe against his title, in this sense that no one can change the cause and nature of his own possession, except by interversion.—Poth. Pos. 31-33, 35, C. O. t. 22, n. 10-12; Guy. Pres. pt. 1, § 6, dist. 3; Salvaing, U. F. c. 94; C. N. 2240. [I. 519.]

2209. A person may prescribe against his title in the sense that he may be freed by prescription from an obligation he has contracted.—Dun. pt. 1, c. 8; Author. under a. 2208; C. N. 2241. [I. 519.]

2210. Positive prescription by thirty years takes place, for the contents of corporeal immoveables in excess of what is given by the title, and negative prescription takes place by the same time in all cases, in diminution of obligations which the title imposes.—In the matter of dues and rents, the enjoyment of more than the title shews a right to does not give rise to the acquisition of such excess by prescription. —Poth. C. R. 149 --; Dun. pt. 1, c. 8; Guy. Rente, 144. [I. 521.]

CHAPTER FOURTH.

OF CERTAIN THINGS IMPRESCRIPTIBLE AND OF PRIVILEGED PRESCRIPTIONS.

2211. The crown may avail itself of prescription. The subject may interrupt such prescription by means of a petition of right, apart from the cases in which the law gives another remedy. — Among privileged persons, the privilege takes effect in the matter of prescription.—Chit. Pr. 340; Poth. Pres. 191; 13 Guy. Priv. 689, 340; Dun. Biens d'église, 32; Delh. r. 276; C. S. L. C. c. 19, s. 1, § 2; C. N. 2227. [I. 521.]

2212. The rights of the crown with regard to sovereignty and allegiance are imprescriptible.—Bac. Deshérence, c. 7, n. 1, 2; Cho. Domaine, l. 3, t. 9, n. 5; Bosq. Pres. n. 1; Lem. C. P. 170, 171 et pas.; C. N. 2226. [I. 521.]

2213. Sea-beaches and lands reclaimed from the sea, ports, navigable or floatable rivers, their banks and the wharfs, works and roads connected with them, public lands, and generally all immoveable property and real rights forming part of the domain of the crown are imprescriptible.—2 O. F. 1110, E. June 1539; Bac. Deshérence, c. 7, n. 4; Dun. 71-75, 273, 275; Cho. Domaine,

l. 3, t. 9, n. 2; Delh. r. 8; N. D. Domaine, § 8, n. 1; Fer. D. Pesche, 382; Bosq. Pres. n. 1; Brod. C. P. a. 12, n. 10, 11; Lem. C. P. 170, 171; Bou. Bib. Tiers, Danger, c. 18; Car. Rép. 500, n. 47; Bac. Deshérence, c. 7, n. 6-8; Poth. Pres. 288; Loisel, Inst. l. 5, t. 3, n. 15, 16; Cho. Domaine, l. 3, t. 9, n. 2, 3, 6; C. N. 2226, 538, 540, 541. [I. 521.]

2214. The rights of the crown to the principal of rents, dues, and revenues owing and payable to it, and to the capital sums accruing from the alienation or from the use of crown property, are also imprescriptible.—Author. under a. 2213. [I. 521.]

2215. All arrears of rents, dues, interest and revenues, and all debts and rights, belonging to the crown, not declared to be imprescriptible by the preceding articles, are prescribed by thirty years.—Subsequent purchasers of immoveable property charged therewith cannot be liberated by any shorter period.—1 Fer. C. P. 312; Poth. C. O. t. 14, n. 36, Pres. 142; Brod. C. P. a. 12, n. 10; Lem. C. P. 170, 1; Bosq. Pres. n. 2; J. P. 11 Jan. 1673; Chit. Pr. 25, 6; St. Rep. 324, The King vs. Black; Bac. Deshérence, c. 7, n. 21, 29; C. N. 2227. [I. 521.]

2216. Property escheated to the crown, by failure of heirs, bastardy or forfeiture, is not considered as incorporated or assimilated to the crown domain for purposes of prescription until a declaration to that effect is made, or until after ten years of enjoyment and actual possession, in the name of the crown, of the totality of the rights thus escheated in the particular case. —Until such incorporation or assimilation, such property continues to be subject to the ordinary prescriptions.—1 O. Néron, 442, Règ. Feb. 1556; 2 Ib. 84, E. April, 1667; A. D. Domaine, n. 1, 2, 30; Bac. Deshérence, c. 7, n. 20-22; Dun. 275; Bosq. Pres. n. 1, 2, Domaine, § 1, n. 7; 1 Fer. C. P. 312, n. 2; Brod. C. P. a. 12, n. 11; Lem. 170, 1; 1 Fer. D. Pres. 411, a. 3; 2 Guil. 4, c. 41; 3 Bur. 36; C. N. 2227. [I. 521.]

2217. Sacred things, so long as their destination has not been changed otherwise than by encroachment, cannot be acquired by prescription. — Burial-grounds, considered as sacred things, cannot have their destination changed, so as to be liable to prescription, until the dead bodies, sacred by their nature, have been removed.—Poth. Pres. c. 7. Pos. 37; Fer. C. P. t. 6, § 3, n. 4, et pas. [I. 523.]

2218. [Positive prescription of corporeal immoveables not sacred, and negative prescription as regards the principal of rents and dues, legacies and rights of hypothec, take place against the church in the same manner and according to the same rules as against private persons.—Purchasers with title and good faith prescribe against the church by ten years, whether positively or negatively, in the same way as against private persons.—Positive prescription of corporeal move-

ables not sacred, and the other negative prescriptions, including that of capital sums, take place against the church as against private persons.]—C. P. 123; C. N. 2227. [I. 523.]

2219. The right to tithes and the rate of the tithe are imprescriptible. Positive prescription by thirty years runs between neighbouring rectors. —Arrears of tithes can only be demanded for one year.—Tithes must be paid at the rector's residence.—O. May, 1679, 1 Ed. & O. 231; Arr. C. S. 18 Nov. 1705; Guy. Dimes, 22-3; Lac. Dixmes; L. & B. let. D. 9, 16, 17; 1 Hen. l. 1, q. 37, 38; 4 Dum. annot. in Decr. p. 156; Bril. Dixmes, n. 109, 156, 157; Delh. r. 274; Fer. C. P. t. 6 § 3, n. 13, & on a. 124, n. 19; 3 L. C. R. 196; 3 Rev. 73, 81. [I. 525.]

2220. Roads, streets, wharfs, landing-places, squares, markets and other places of a like nature, possessed for the general use of the public, cannot be acquired by prescription, so long as their destination has not been changed otherwise than by tolerating the encroachment.—Author. under a. 2201; ff. L. 9, De viâ; Dun. c. 12, p. 74; C. N. 538, 2227. [I. 525.]

2221. Any other property belonging to municipalities or corporations, the prescription of which is not otherwise determined by this code, is subject even when held in mortmain, to the same prescriptions as the property of private persons.—[I. 525.]

CHAPTER FIFTH.

OF THE CAUSES WHICH INTERRUPT OR SUSPEND PRESCRIPTION.

SECTION I.

Of the causes which interrupt prescription.

2222. Prescription may be interrupted either naturally or civilly.—Darg. on 266 C. Br. Interruption, c. 4-6; Poth. Pres. n. 28, 152, B. R. 200; Guy. Interruption, 489; Dun. 52; C. N. 2242. [I. 527.]

2223. Natural interruption takes place when the possessor is deprived, during more than a year, of the enjoyment of the thing, either by the former proprietor or by any one else. —ff. L. 5, De usurp.; Cod. L. 7, § 5, De pres. 30 v. 40 ann.; L. 5, De duo. reis; Darg. on 269 C. Br. Interrupt. c. 4; 9 Cuj. col. 977 D.; Poth. Pres. 39, 40, 152, Pos. 73-76, B. R. 200, C. O. t. 14, n. 23; Guy. Interruption, 489, 490; Dun. 52; C. N. 2243. [I. 527.]

2224. A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption.—Seizures, set-off, interventions and oppositions, are considered as judicial demands.—No extra-judicial demand, even when made by a notary or bailiff, and accompanied with the titles, or even signed by the party notified, is an interruption, if there be not an acknowledgment of the right.—Cod. L. 3, De ann.

ex.; Darg. on 266 C. Br. Interrupt. c. 5, n. 1; 9 Cuj. col. 977, D.; col. 984-5, proem. et texte ad L. prædict. Cod; Bril. Ajournement, n. 13; L. & B. let. A 10, n. 1; 2 J. P. 573; 1 J. A., l. 8, c. 8; Poth. Ob. 692, 696, 711, Pres. 48, 50, 51, 152, C. R. 141-2, C. O. t. 14, n. 26, 44, 50; Guy. Interruption, 490; Fer. on 113 C. P. gl. 5, n. 6-11; Tr. Pres. 561-4, 576, 584, 579; Dun. 55-57; Brod. on 113 C. P. n. 4; Lam. arr. t. 29, n. 45; C. N. 2244. [I. 527.]

2225. A demand brought before a court of incompetent jurisdiction does not interrupt prescription.—Cod. L. penult. Ne de statu.; Cod. L. 5, De duo. reis; Pap. Arr. l. 12, t. 3, n. 24; 2 Dum. 680, arr. 102 & n.; J. A., l. 1, c. 1, 34, p. 72; Dun. 56-7; Poth. Ob. 696, Pres. 51; Fer. on a. 113 C. P. gl. 5, n. 9, i. f.; Arr. Lam. t. 29, a. 45; Tr. Pres. n. 596-8; Cho. on C. Anj. 245; Bas. on 485 C. Nor. 320, i. f.; Desp. pt. 4, t. 4, n. 29, 3°; Le Camus, in Fer. C. P. t. 7, § 4, n. 14; C. N. 2246. [I. 527.]

2226. Prescription is not interrupted:—If the service or the procedure be null from informality;—If the plaintiff abandon his suit;—If he allow peremption of the suit to be obtained;—If the suit be dismissed.—Darg. on. C. Br. Interruption, c. 6, c. 8, n. 10, 11; Poth. Ob. 696, Pres. 53, 153, C. O. t. 14, n. 26, 50, 56; Fer. on 113 C. P. gl. 5, n. 9, 11; Brod. on 113 C. P. n. 4; C. N. 2247. [I. 527.]

2227. Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs.—Cod. L. 7, § 5, De pres. 30 v. 40 ann.; L. 5, De duo. reis; Darg. on 266 C. Br. Interruption, c. 5; 9 Cuj. col. 977, E.; Poth. Ob. 692, 699, 700, C. R. 143, 4, C. O. t 14, n. 44-49; C. N. 2248. [I. 529.]

2228. A judicial demand brought against the principal debtor, or his acknowledgment, interrupts prescription as regards the surety. The same acts against or by a surety interrupt prescription as regards the principal debtor.—Poth. Ob. 665, 698; Guy. Interruption, 490; Dun. 60; Tr. Pres. n. 633-635; C. N. 2250. [I. 529.]

2229. Renunciation by any person of a prescription acquired does not prejudice his codebtors, his sureties, or third parties.—Poth. Ob. 699, C. R. 145; Tr. Pres. n. 629, 634-636. [I. 529.]

2230. Every act which interrupts prescription with regard to one of joint and several creditors benefits the others.—When the obligation is indivisible, acts of interruption with regard to some only of the heirs of a creditor, benefit the others.—If the obligation be divisible, even when the debt is hypothecary, acts of interruption in behalf of some only of such heirs do not benefit the other heirs. In the same case these acts only benefit the other joint and

several creditors for the share of the heirs with regard to whom such acts have been done. In order that the interruption should in this case produce the full effect with regard to the other joint and several creditors, it is necessary that the acts which interrupt should have been done as to all the heirs of the deceased creditor.—Cod. L. 5, De duo. reis; Poth. Ob. 260, 697, Pres. 54, C. O. t. 14, n. 27, 51; C. N. 1199, 2249. [I. 529.]

2231. Every act which interrupts prescription by one of joint and several debtors, interrupts it with regard to all.—Acts of interruption with regard to one of the heirs of a debtor, interrupt prescription with regard to the other heirs and joint and several debtors, when the obligation is indivisible.—If the obligation be divisible, even when the debt is hypothecary, a judicial demand brought against one of the heirs of a joint and several debtor, or his acknowledgement, does not interrupt prescription with regard to the other heirs; without prejudice to the right of the creditor to exercise his hypothec within the proper time on the whole of the immoveable property charged, for that portion of the debt for which he retains his right.—In the same case, these acts only interrupt prescription with regard to the joint and several codebtors for the share of the heir who is sued or has acknowledged the right. In order that in this case the interruption should take place for the whole with regard to the joint and several codebtors, it is necessary that the judicial demand or the acknowledgment should take place with regard to all the heirs of the deceased debtor.—Acts which interrupt prescription with regard to the debtor do not interrupt the prescription by a third party holding the immoveable property burthened with any charge or hypothec; they affect him in the sense that they hinder the extinction by prescription of the debt to which the hypothec is attached.—These acts against the holders of other immoveables or of other portions of the same immoveable, do not prejudice the holder of a separate portion of the property, with regard to whom they have not taken place.—When done with regard to one joint holder of undivided property they interrupt prescription with regard to the others.—In natural interruption, however, it suffices that one of the possessors of undivided property, or an heir of one of them, should have kept useful possession of the whole in order to secure the advantage of it to the others.—Cod. L. 5, de duo. reis; C. P. 115; Poth. Ob. 272, 697, Pres. 55, 56, 148, C. O. t. 14, n. 27, 51; C. N. 1206, 2249. [I. 529.]

SECTION II.

Of the causes which suspend the course of prescription.

2232. [Prescription runs against all persons, unless they are included in some exception

established by this code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others.—Saving what is declared in article 2269, prescription does not run, even in favor of subsequent purchasers, against those who are not born, nor against minors, idiots, madmen or insane persons, with or without tutors or curators. Those to whom a judicial adviser is given and persons interdicted for prodigality do not enjoy this privilege.—Prescription runs against absentees as against persons present and by the same lapse of time, saving what is declared as to persons authorized to take provisional possession of the estate of an absentee.]—Poth. Ob. 674, 683, Pres. 22, 23; C. N. 2251. [I. 531.

2233. Husband and wife cannot prescribe against each other.—Poth. Ob. 680, C. O. t. 14, n. 39; Leb. Com. l. 3, c. 2, s. 1, dist. 1, n. 29; C. N. 2253. [I. 531.]

2234. Prescription runs against a married woman whether separated or in community, with respect to her private property, including her dowry, even when her husband has the administration of it, saving her recourse against her husband. Nevertheless, when the husband is liable as warrantor for having alienated the property of the wife without her consent, and in all cases where the action against the debtor or the possessor would turn against the husband, prescription does not run against the married woman, even in favor of subsequent purchasers.—Poth. Ob. 680, B. R. 206, P. Mar. 79, 80; Dun. pt. 3, c. 3, p. 451, 2; Leb. Com. l. 3, c. 2, s. 1, dist. 1, n. 16-30; Arg. à contr. de L. 30, fragm. "Omnis" Cod. De ju. dot.; C. N. 2254, 2256. [I. 531.]

2235. Neither does prescription run against the wife during marriage, even in favor of subsequent purchasers, with respect to dower and other rights of survivorship, nor with respect to the preciput or other distinct rights which she can only exercise after the dissolution of the community, either by accepting or renouncing, unless the community has been dissolved during the marriage; at the time of which dissolution prescription begins against the wife, as regards the rights which she may then exercise in consequence of such dissolution.—Saving what is excepted in the present article, prescription acquired or which has run against the property of the community affects the share of the wife who accepts.—C. P. 117; Poth. Ob. 679; Dun. Pres. 251, 2; 2 Dum. C. Bourb. a. 28, p. 740; Marc. on a. 2256. n. 4; Tr. n. 767, 784; C. N. 2255, 2256. [I. 531.]

2236. Prescription of personal actions does not run:—With respect to debts depending on a condition, until such condition happens;—With respect to actions in warranty, until the eviction takes place;—With respect to debts with a term, until the term has expired.—Cod. L. 7, § 4, de pres. 30 v. 40

an.; Poth. Ob. 679, Suc. c. 4, a. 5, § 3; Marc. on a. 2257, p. 169, 170; C. N. 2257. [I. 533.]

2237. Prescription does not run against a beneficiary heir, with respect to claims he has against the succession.—It runs against a vacant succession, although there be no curator.—Poth. Ob. 680, 684; C. N. 2258. [I. 533.]

2238. It runs during the delays for making an inventory and deliberating.—Poth. Ob. 684; C. N. 2259. [I. 533.]

2239. The particular rules concerning the suspension of prescription with regard to joint and several creditors and their heirs are the same as those concerning interruption in like cases, explained in the preceding section. [I. 533.]

CHAPTER SIXTH.

OF THE TIME REQUIRED TO PRESCRIBE.

SECTION I.

General provisions.

2240. Prescription is reckoned by days and not by hours.—[Prescription is acquired when the last day of the term has expired; the day on which it commenced is not counted.]—Poth. Pres. 102, 170; Guy. Pres. 344, 5; Dun. 115, 6; C. N. 2260, 2261. [I. 533.]

2241. The rules of prescription in other matters than those mentioned in the present title are explained in the particular titles relating to such matters.—[I. 533.]

SECTION II.

Of prescription by thirty years, of prescription of rents and interest, and of the duration of the plea of prescription.

2242. All things, rights and actions the prescription of which is not otherwise regulated by law, are prescribed by thirty years, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith.—C. P. 118; Author. under a. 2268; Fer. on 118 C. P. i. p. & n. 9; Poth. Pres. 162-4, 172-4, 180--, 278; Guy. Pres. p. 369, 370, 372; C. N. 2262, 475. [I. 535.]

2243. Prescription of the action to account and of the other personal actions of minors against their tutors, relating to the acts of the tutorship, takes place conformably to this rule, and is reckoned from the majority.—[I. 535.]

2244. If a title be shewn, it helps to establish the defects of the possession which hinder prescription.—[I. 535.]

2245. [Prescription by thirty years, has, in all prescriptible cases, the same effects as that by a hundred years or as immemorial prescription formerly had, whether as regards the right, or for covering the defects of title, informalities or bad faith.]—[I. 535.]

2246. Any person who is in possession as proprietor of a thing or a right, preserves, by reason of such possession, his right to set up by plea against any demand in revendication

of such thing or right, all such grounds of nullity or other grounds as tend to defeat the action, although his right to do so by direct action may have been prescribed.—In personal actions, likewise, the defendant may effectively plead all grounds tending to defeat the action, although the time during which he could urge such grounds by direct action may have elapsed.—The foregoing provisions of this article apply only to such grounds of exception as strike at the principle of the action and destroyed it at a time when no acquired prescription could prevent them from doing so. Thus a claim prescribed cannot be pleaded in compensation unless the compensation had taken effect before it was prescribed, and then it may be pleaded [whether the claim be for a debt of a commercial nature or for any other cause.]—The adoption of the grounds of such plea does not revive the right to urge them by direct action.—Fer. on 106 C. P. n. 1, 2; 2 Hen. l. 4, 9, 78; Dom. Legum delect. l. 44, t. 4, n. 11; Tr. Pres. n. 827-834; 7 Toul. n. 600; 2 L. C. R. Halcro vs. Delesderniers; Poth. Ob. 676; C. S. L. C. c. 67, s. 5. [I. 537.]

2247. The hypothecary action joined to the personal is not subject to a longer prescription than the latter alone.—Fer. on 118 C. P. i. p. & n. 12-16; Dun. 308; Poth. Hyp. c. 3, § 6; 1 L. C. J. 271; C. N. 2262. [I. 537.]

2248. [The term attached by law or by stipulation to a right of redemption is absolute without prescription being required.—So is the term attached to the right of a vendor to take back an immoveable, by reason of non-payment of the price.]—The right to redeem rents comes from the law; it is imprescriptible.—C. P. 120; C. S. L. C. c. 50, s. 1, 3; 7 L. C. R. 66, Patenaude & Lérigé. [I. 537.]

2249. After twenty-nine years from the date of the last title, the debtor of emphyteutic dues or of a rent may be obliged, at his own cost, to furnish the creditor or his legal representatives with a renewal-deed.—Fer. on 118 C. P. n. 19; Marc. on 2263; C. N. 2263. [I. 537.]

2250. [With the exception of what is due to the crown, all arrears of rents, including life-rents, all arrears of interest, of house-rent or land-rent, and generally all fruits natural or civil are prescribed by five years.—This provision applies to claims resulting from emphyteutic leases or other real rights, even where there is privilege or hypothec.—Prescription of arrears takes place although the principal be imprescriptible by reason of precarious possession.]—Prescription of the principal carries with it that of the arrears.—Poth. C. R. 138-9; Guy. Arrérages, 621-2, Pres. 410 --, Bail, a. 16; Fer. on 124 C. P. gl. 3, n. 6, 7; 1 Bour. 310, n. 35, p. 328, n. 40; 2 Id. 569, n. 33; p. 570, n. 42-3; p. 571, n. 45; C. S. L. C. c. 50, s. 1, 3; c. 37, s. 37, § 1, 2; 10 L. C. R. 379; 8

Ib. 509; Dun. 169; Lac. Pres. s. 2, n. 9; 1 Rev. 237, 190; 4 L. C. J. 145; O. 1510, i. f.; O. 1629, a. 142; Loy. Déguerp. l. 1, c. 6, n. 11; N. D. Arrérages, § 6, n. 2; C. N. 2277. [I. 539.]

SECTION III.

Of prescription by subsequent purchasers.

2251. He who acquires a corporeal immoveable in good faith under a translatory title, prescribes the ownership thereof and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of such title [during ten years.]—C. P. 113-5; Poth. Pres. 125 --, et pas.; C. N. 2265. [I. 539.]

2252. A subsequent purchaser of dues or rents, with title and in good faith, prescribes the capital thereof by means of an indefective enjoyment during [ten years,] against the creditor who has during that time entirely failed to enjoy and neglected to act.—C. P. 113, 114; Fer. on 113 C. P. gl. 2, & gl. 3, n. 30; Dun. 305; Brod. on 113 C. P. n. 1; Dup. Pres. 500, 1. [I. 541.]

2253. It is sufficient that the good faith of subsequent purchasers existed at the time of the purchase, even when their effective possession only commenced later.—The same rule is observed with regard to every preceding purchaser whose possession is added to theirs for this prescription.—Cons. of C. S. L. C. c. 37, s. 5, § 2; C. N. 2269. [I. 541.]

2254. A title which is null by reason of informality cannot serve as a ground for prescription by ten years.—Darg. on 266 C. Br. v. Par quelque titre, n. 5, 6; Lem. on. 113 C. P.; Tr. on a. 2267; C. N. 2267. [I. 541.]

2255. After prescription by ten years has been renounced or interrupted, prescription by thirty years alone can be commenced.—Fer. on 113 C. P. gl. 3, n. 30; Poth. Hyp. c. 3, § 6. [I. 541.]

2256. Prescription by ten years and the other lesser prescriptions may be invoked separately against the same demand together with that by thirty years. [I. 543.]

2257. In cases where prescription by ten years can run, each new holder of an immoveable burthened with a servitude, charge or hypothec, may be obliged to furnish a renewal-title at his own cost.—Fer. on 101 C. P. n. 4; Poth. C. O. t. 20, n. 53. [I. 543.]

SECTION IV.

Of certain prescriptions by ten years.

2258. The action in restitution of minors for lesion, the action in rectification of tutors' accounts and that in rescission of contracts for error, fraud, violence or fear, are prescribed by ten years.—This time runs in the case of violence or fear from the day it ceased; and in the case of error or fraud from the day it was discovered.—This time only runs with regard to interdicted persons from the

day the interdiction is removed, except for prodigals or persons to whom a judicial adviser has been given. It does not run against idiots, madmen and insane persons although not interdicted. It does not run against minors until they become of age.—Cod. L. 7, De temp. in integ.; Dom. l. 3, t. 7, s. 4; l. 4, t. 6, s. 1, n. 1, & s. 2, n. 1; O. 1510, a. 46; O. 1535, c. 8, n. 30; O. 1539, a. 134; A. D. Rescindant, n. 1, 14-18; Mes. Minorités, c. 14, n. 9, 13, 14; 7 Toul. n. 596-604; C. N. 1304. [I. 543.]

2259. After ten years, architects and contractors are discharged from the warranty of the work they have done or directed.—Fer. on 113 C. P. gl. 6, n. 23; Guy. Architecte, l. f.; Fer. D. Garantie; A. D. Bâtiment, n. 10; N. D. e. v. § 7, n. 5 --; C. N. 2270. [I. 543.]

SECTION V.

Of certain short prescriptions.

2260. The following actions are prescribed by five years:

1. For professional services and disbursements of advocates and attorneys, reckoning from the date of the final judgment in each case;

2. [For professional services and disbursements of notaries, and fees of officers of justice, reckoning from the time when they became payable;]

3. Against [notaries,] advocates, attorneys and other officers or functionaries who are depositaries in virtue of their office, for the recovery of papers and titles confided to them; reckoning from the termination of the proceedings in which such papers and titles were made use of, or, [in other cases, from the date of their reception;]

4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of grain or other things, whether negotiable or not, [or upon any claim of a commercial nature,] reckoning from maturity; this prescription however does not apply to bank-notes;

5. Upon sales of moveable effects [between non-traders] or between traders and non-traders, these latter sales being in all cases held to be commercial matters;

6. [For hire of labor, or for the price of manual, professional or intellectual work and materials furnished; saving the exceptions contained in the following articles;]

7. For visits, services, operations and medicines of physicians or surgeons, reckoning from each service or thing furnished. As regards whatever is sued for within the year, the oath of the physician or surgeon makes proof as to the nature and duration of the services.—*As to* § 1—C. S. L. C. c. 82, s. 3, 4; Poth. Ob. 725; C. N. 2272, 3.—*As to* § 3—Poth. Ob. n. 726; Guy. Pres. 358, 362, Procureur, 716; C. N. 2276.—*As to* § 4, C. S. L. C. c. 64, s. 30, 31; Byles, 7, 273; 21 Jac. 1, c. 16, s. 3; Chit. 381-389; C. L. 3505; C. Co. 189.—*As to* § 5—O. 25 Geo. 3, c. 2, s. 10; C. S. L. C. c. 67, s. 1, 2, c, 82, s. 17, 18, c. 83, s. 26; St.

Rep. 44.—*As to* § 6—6 L. C. R. 260.—*As to* § 7—C. S. L. C. c. 71, s. 15, 16; Fer. D. Médecine; C. P. 125; C. N. 2272. [I. 545, 547, 549.]

2261. [The following actions are prescribed by two years:

1. For seduction, or lying-in expenses;

2. For damages resulting from offences or quasi-offences, whenever other provisions do not apply;

3. For wages of workmen not reputed domestics and who are hired for a year or more;

4. For sums due schoolmasters and teachers, for tuition, and board and lodging furnished by them.—*As to* § 1—2 Dar. Inj. 197, 384; Four. S. 108.—*As to* § 2—Author. under a. 2260, § 5.—*As to* § 4—Poth. Ob. n. 709, 3° & 4°. [I. 545, 547.]

2262. The following actions are prescribed by one year:

1. For slander or libel, reckoning from the day that it came to the knowledge of the party aggrieved;

2. [For bodily injuries, saving the special provisions contained in article 1056 and cases regulated by special laws;]

3. [For wages of domestic or farm servants, merchants' clerks and other employees who are hired by the day, week or month, or for less than a year;]

4. [For hotel or boarding-house charges.]—*As to* § 1—Guy. Injures, 239; Dun. 144; Dar. Inj. c. 10, s. 1; Car. Obs. Injures; Imb. Pratique, c. 33, n. 4.—*As to* § 3—C. P. 127; O. 1510, a. 67; Poth. Ob. 709, 5°, 116; Fer. on 127 C. P. n. 16-20, 23, obs. 8; 2 Rev. 166; 2 L. C. J. p. 183; 3 Do. 299; C. S. L. C. c. 37, s. 8; C. N. 1781, 2272.—*As to* § 4—Author. under a. 2261, § 4. [I. 545; III. 389.]

2263. Short limitations and prescriptions established by acts of parliament, follow the rules peculiar to them, as well in matters respecting the rights of the crown as in those respecting the rights of all others. —[I. 549.]

2264. After renunciation or interruption, except as to prescription by ten years in favor of subsequent purchasers, prescription recommences to run for the same time as before, if there be no novation, saving the provisions of the following article.—[I. 549.]

2265. Any action which is not declared to be perempted, and any judicial condemnation, constitutes a title which is only prescribed by thirty years, although the subject matter thereof be sooner prescriptible. —A judicial admission interrupts prescription, even in an action the peremption of which is declared or which is otherwise insufficient to interrupt it alone; but the prescription which recommences is not thereby prolonged.—Poth. Ob. 696, 701, 711; Fer. on 125 C. P. n. 7, 8, on 126 C. P. gl. 2, & on t. 6, § 4, n. 40; C. N. 2244, 2247, 2248.—[I. 549.]

2266. A continuation of like services, work, sales or supplies, does not hinder a prescription, if there have been

no acknowledgment or other cause of interruption.—C. P. 126, 127; Poth. Ob. 714; O. C. 1673, t. 1, a. 9; C. N. 2274. [I. 551.]

2267. [In all the cases mentioned in articles 2250, 2260, 2261 and 2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.]—Poth. Ob. 718-721, 726, 727, C. O. 265; Fer. on 125 C. P. n. 3-5, O. C. 1673, t. 1, a. 10; C. N. 2275. [I. 551.]

2268. Actual possession of a corporeal moveable, by a person as proprietor, creates a presumption of lawful title. Any party claiming such moveable must prove, besides his own right, the defects in the possession or in the title of the possessor who claims prescription, or who, under the provisions of the present article, is exempt from doing so.—Prescription of corporeal moveables takes place after the lapse of three years, [reckoning from the loss of possession,] in favor of possessors in good faith, [even when the loss of possession has been occasioned by theft.] — This prescription is not, however, necessary to prevent revendication, if the thing have been bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, [nor in commercial matters generally;] saving the exception contained in the following paragraph.—Nevertheless, so long as prescription has not been acquired, the thing lost or stolen may be revendicated, although it have been bought in good faith in the cases of the preceding paragraph; but the revendication in such cases can only take place upon reimbursing the purchaser for the price which he has paid.—If the thing have been sold under the authority of law, it cannot, in any case, be revendicated.—The stealer or other violent or clandestine possessor of a thing, and his successors by general title, are debarred from prescribing by articles 2197 and 2198.—Poth. Pres. n. 199-202, 204, 5, C. O. t. 14, n. 4; Bour. l. 3, t. 2, c. 1, t. 22, c. 5; Poc. c. 10, a. 15, 16; Dun. 150; Brod. on 118 C. P. n. 2; Fer. on t. 6, C. P. § 3, n. 2, & on a. 113, gl. 6, n. 5; Tr. Pres. on a. 2279, 2280; C. N. 2279, 2280. [I. 553; III. 389.]

2269. Prescriptions which the law fixes at less than thirty years, other than those in favor of subsequent purchasers of immoveables with title and in good faith, and that in case of rescission of contracts mentioned in article 2258, run against minors, idiots, madmen and insane persons, whether or not they have tutors or curators, saving their recourse against the latter.—Poth. Ob. 717; Dun. Pres. p. 241, 2; Guy. Pres. 330; Hen. l. 4, q. 135, n. 11; 2 Lep. Lois des bât. 10; C. N. 2278. [I. 553.]

SECTION VI

Transitory provisions.

2270. Prescriptions begun before the promulgation of this code, must be governed by the former laws.—[Nevertheless

prescriptions then begun, for which, according to these laws, an immemorial duration or one of a hundred years is required, are acquired without respect to such necessity.]—[I. 553.]

TITLE TWENTIETH.

OF IMPRISONMENT IN CIVIL CASES.

2271. Imprisonment under a judgment rendered in a civil action is not allowed, except against the persons and in the cases specified in the following articles.—C. S. L. C. c. 87, s. 7, § 3, s. 24. [III. 209.]

2272. The persons liable to imprisonment are:

1. Tutors and curators, for whatever is due by reason of their administration, to those whom they represented;

2. Any person indebted as sequestrator, guardian or depositary, sheriff, coroner, bailiff, or other officer having charge of moneys or other things under judicial authority;

3. Any person indebted as a judicial surety, or for the purchase of property or effects, moveable or immoveable, sold in execution of the judgment of a court;

4. Any person indebted in damages awarded by the judgment of a court for personal wrongs, for which imprisonment may by law be awarded;

5. Any person sued in damages under the provisions of chapter 47 of the Consolidated Statutes for Lower Canada, and against whom judgment has been rendered for such damages with condemnation of imprisonment.—C. S. L. C. Ib. & c. 47, s. 2, § 2. [III. 209.]

2273. Persons are also subject to imprisonment for contempt of any process or order of court, and for resistance to such process or order, and for any fraudulent evasion of any judgment or order of court, by preventing or obstructing the seizure or sale of property in execution of such judgment.—C. S. L. C. c. 87, s. 7, § 3, s. 24, c. 47, s. 2, § 2, O. 1667, t. 34, a. 2-4; C. N. 2060. [III. 209.]

2274. Any debtor imprisoned or held to bail, in a cause wherein judgment for a sum of eighty dollars or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property, for the benefit of his creditors, according to the rules, and subject to the penalty of imprisonment in certain cases, provided in chapter 87 of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure.—Ib. c. 87, s. 12, 13. [III. 211.]

2275. When the statement and declaration of abandon-

ment are made without fraud, as specified in the last preceding article, the debtor is exempt from arrest and imprisonment by reason of any cause of action existing before the making of such statement and declaration, unless such debtor is arrested and imprisoned for any debt of the description specified in articles 2272 and 2273.—Ib. c. 87, s. 13, § 3, s. 16, § 1, 2. [III. 211.]

2276. No priest or minister of any religious denomination, no person of the age of seventy years or upwards, and no female, can be arrested or imprisoned, by reason of any debt or cause of civil action, except such persons as fall within the cases declared in articles 2272 and 2273.—Ib. c. 87, s. 7. [III. 211.]

2277. The arrest and imprisonment of debtors under process of *capias ad respondendum* are made according to the provisions contained in the act referred to in article 2274, and in the Code of Civil Procedure.—C. S. L. C. c. 87, s. 1, 2, 9. [III. 211.]

BOOK FOURTH.

COMMERCIAL LAW.

GENERAL PROVISION.

2278. The principal rules applicable in commercial cases which are not contained in this book are declared in the several preceding books, and more especially in the titles *Of Obligations, Of Sale, Of Lease, Of Mandate, Of Pledge, Of Partnership* and *Of Prescription*, in the third book. [III. 269.]

TITLE FIRST.

OF BILLS OF EXCHANGE, NOTES AND CHEQUES.

CHAPTER FIRST.

OF BILLS OF EXCHANGE.

SECTION I.

Of the nature and requisites of bills of exchange.

2279. A bill of exchange is a written order by one person to another for the payment of money absolutely and at all events.—Poth. Ch. n. 3; 2 Par. n. 330 --; Sm. M. L. 207-9; Bay. B. 1; Sto. B. E. n. 52, 53; 3 Kt. Com. 74; Coté vs. Lemieux, 9 L. C. R. 221. [III. 269.]

2280. It is essential to a bill of exchange —That it be

in writing and contain the signature or name of the drawer;—That it be for the payment of a specific sum of money only;—That it be payable at all events without any condition.—Author. under a. 2279. [III. 269.]

2281. The parties to a bill of exchange at the time of making it are the drawer of the bill and the payee.—The drawee becomes a party by acceptance and is then called the acceptor.—Indorsers, warrantors upon the face of the bill, the person requested to pay *au besoin* who accepts, acceptors *supra protest* and holders also become parties.—Dom. l. 1, c. 16, s. 4; Poth. Ch. n. 17-26; 1 Nou. L. C. 148, 9; Bay. B. c. 1, § 2 --; Sto. B. E. n. 35, 36, 254, 5. [III. 269.]

2282. A bill of exchange may be made payable either to a certain person by name or other sufficient indication, or to such person or his order, or to the order of the drawer or to bearer.—If the name of the payee be left in blank the legal holder of the bill may fill up the blank.—Poth. Ch. n. 31, 223, 4; 1 Savary, P. N. 201; 1 Nou. L. C. 148; Ros. B. 2, 22; Sto. B. E. n. 54-57; C. S. L. C. c. 64, s. 3; O. 1673, t. 5, a. 1; C. Co. 110. [III. 269.]

2283. If no time be specified in the bill for its payment, it is held to be payable on demand; if no place be specified, it is payable generally.—C. S. L. C. c. 64, s. 9; C. S. C. c. 57, s. 4. [III. 269.]

2284. Foreign bills of exchange are usually drawn in sets of several parts, all of which the drawer is bound to deliver to the payee.—Poth. Ch. n. 37, 130; 2 Par. n. 342; 1 Chit. & H. 3; Bay. B. 30; Sto. B. E. n. 66; C. Co. 110. [III. 271.]

2285. When a bill contains the words "value received," value for the amount of it is presumed to have been received on the bill and upon the indorsements thereon. The omission of these words does not render the bill invalid.—Poth. Ch. n. 34; O. 1673, t. 5, a. 1; C. S. L. C. c. 57, s. 4; Duchesnay, vs. Evarts, 2 Rev. 31; Hart, vs. Macpherson, Gir. L. C. 66; 8 L. C. R. Larocque & al, vs. Franklin Bank, 328; Bay. B. c. 1, § 14, p. 40; Sto. B. E. n. 63; C. 989; C. Co. 110, 137. [III. 271.]

SECTION II.

Of the negotiation of bills of exchange.

2286. Bills of exchange payable to order are transferred by indorsement, which may be either in full or in blank. When indorsed in blank, they become transferable by delivery. Bills payable to bearer are transferable by delivery either with or without indorsement.—C. S. L. C. c. 57, s. 3. [III. 271.]

2287. The transfer of a bill by indorsement may be made either before or after it becomes due. In the former case the holder acquires a perfect title free from all liabilities and

objections which any parties may have had against it in the hands of the indorser; in the latter case the bill is subject to such liabilities and objections, in the same manner as if it were in the hands of the previous holder.—Poth. Ch. n. 141; 2 Par. 352; Sto. B. E. n. 220; Bay. B. 162, 3; Wood et al. vs. Shaw, 3 L. C. J. 175. [III. 271.]

2288. An indorsement may be restrictive, qualified or conditional, and the rights of the holder under such indorsement are regulated accordingly.—But no indorsement other than that by the payee can stop the negotiability of the bill.—Bay. B. 126; Sto. B. E. n. 217; 3 Kt. Com. 90; 2 Par. n. 348; Chit. & H. 17. [III. 271.]

2289. The holder may, at his option, strike out the last indorsement, although it be in full, and any prior indorsement in blank subsequent to that of the payee.—Ros. B. 285; 3 Kt. Com. 89; Sto. B. E. n. 208. [III. 271.]

SECTION III.

Of acceptance.

2290. Bills of exchange payable at sight, or at a certain period of time after sight or after demand, must be presented for acceptance. — The presentment is made by the holder, or in his behalf, to the drawee or his representative, at his domicile or place of business, or if the drawee be dead or cannot be found, and is not represented, presentment is made at his last known domicile or place of business.—If there be also a drawee *au besoin*, presentment is made to him in like manner. — Poth. Ch. n. 137, 146; 1 Nou. 220, n. 3; 2 Par. n. 358, 362, 381; Bay. B. 244, 5; Sto. B. E. n. 228, 229, 235, 254; Chit. B. 301 (8 Ed.); C. S. L. C. c. 64, s. 15, § 2; C. Co. 173; C. 2308. [III. 271.]

2291. Presentment for acceptance when necessary must be made within a reasonable time from the making of the bill according to the usage of trade and the discretion of the courts.—Poth. Ch. n. 143; Sto. B. E. n. 231. [III. 273.]

2292. The acceptance must be in writing upon the bill or upon one of the parts of the bill.—C. S. L. C. c. 64, s. 5. [III. 273.]

2293. The acceptance must be absolute and unconditional, but if the holder consent to a conditional or qualified acceptance the acceptor is bound by it.—Poth. Ch. n. 47-49; O. 1673, t. 5, a. 2; 2 Par. n. 370, 372; Bay. B. 201, 202; Sto. B. E. n. 240. [III. 273.]

2294. The effect of acceptance is to oblige the acceptor to pay the bill to the holder according to its tenor. — The signature of the drawer is admitted by the acceptance and cannot afterwards be denied by the acceptor against a holder in good faith.—Poth. Ch. n. 44, 115-117; Hein. de camb. c. § 26 --; c. 6, § 5; 2 Par. n. 376; Sto. B. E. n. 113, 261, 262; Bay. B. 318, 319. [III. 273.]

2295. When a bill has been accepted and delivered to the

holder the acceptance cannot be cancelled otherwise than by the consent of all the parties to the bill.—Poth. Ch. n. 44; 1 Sav. P. N. 840; 2 Par. n. 377; Bay. B. 208 --; 3 Kt. Com. 85. [III. 273.]

2296. When a bill has been protested for non-acceptance or for non-payment it may with the consent of the holder be accepted by a third person for the honor of the parties to it or of any of them. Such acceptance benefits the parties only who are subsequent to the one for whose honor it is made.—Poth. Ch. 113, 114, 170, 171; Jou. O. 1673, t. 5, a. 3, 75; 2 Par. n. 383, 388; Bay. B. 176-180; Sto. B. E. n. 121, 122, 123, 125; 3 Kt. Com. 87; C. Co. 126. [III. 273.]

2297. An acceptor *supra protest* is bound to give notice of his acceptance without delay to the party for whose honor he accepts and to other parties who may be liable to him on the bill.—Poth. Ch. n. 113, 114; Jou. O. 1673, t. 5, a. 3, 75, 76; 2 Par. n. 386; Bay. B. 179, 180; Sto. B. E. n. 124, 256; C. Co. 127. [III. 273.]

SECTION IV.

Of noting and protest for non-acceptance.

2298. Whenever acceptance of a bill of exchange is refused by the drawee the bill may be forthwith protested for non-acceptance, and after due notice of such protest to the parties liable upon it, the holder may demand immediate payment of it from such parties in the same manner as if the bill had become due and had been protested for non-payment. —The holder is not bound afterwards to present the bill for payment, or, if it be so presented, to give notice of the dishonor.—C. S. L. C. c. 64, s. 10. [III. 273.]

2299. The holder of any bill of exchange, instead of protesting upon the refusal to accept, may at his option cause it to be noted for non-acceptance, by a duly qualified notary; such noting to be made underneath or to be endorsed upon a copy of the bill and kept upon record by the officiating notary.—Ib. c. 64. s. 12. [III. 275.]

2300. When a bill which has been noted for non-acceptance as provided in the last preceding article is afterwards protested for non-payment, a protest for non-acceptance need not be extended, but the noting, with the date thereof and the name of the notary by whom the same was made, must be stated in the protest for non-payment.—Ib. c. 64, s. 12. [III. 275.]

2301. Upon every bill noted or protested for non-acceptance, the words "noted for non-acceptance," or "protested for non-acceptance," as the case may be, together with the date of noting or protesting, and his fees and charges, must be written or stamped by the officiating notary, and subscribed by him with his name or initials as such notary.—Ib. c. 64, s. 12. [III. 275.]

2302. When a bill is noted

for non-acceptance the holder is not bound to give notice of the same in order to hold any party liable thereon. But whenever a bill so noted is afterwards protested for non-payment, the notice of such protest must contain a notice of the previous noting for non acceptance.—Ib. c. 64, s. 20. [III. 275.]

2303. The noting and protesting of bills of exchange for non-acceptance and the giving notice thereof, are done by the ministry of a single public notary without witnesses, in the manner and according to the forms prescribed by the act intituled *An act respecting bills of exchange and promissory notes.*—Ib. c. 64, s. 11, 22; C. 1209. [III. 275.]

2304. In case there is no notary in the place, or he is unable or refuses to act, any justice of the peace in Lower Canada may make such noting and protest and give notice thereof in the same manner, and his acts in that behalf have the same effect as if done by a notary; but such justice must set forth in the protest the reasons why the same was not made by the ministry of a notary.—Ib. c. 64, s. 24. [III. 275.]

2305. The duplicate protest and notice, with the certificate of service, and all copies thereof attested by the signatures of the notary or the justice of the peace as the case may be, are *primâ facie* evidence.—Ib. c. 64, s. 14, 24; C. S. C. c. 57, s. 6. [III. 275.]

SECTION V.

Of payment.

2306. Every bill of exchange must be presented by the holder, or in his behalf, to the drawee or acceptor for payment, on the afternoon of the third day after the day it becomes due, or after presentment for acceptance, if drawn at sight; unless such third day falls upon a legal holiday, in which case the next day thereafter not being a legal holiday is the last day of grace. If the bill be payable at a bank, presentment may be made there either within or after the usual hours of banking.—If the bill be unaccepted and there be a drawee *au besoin*, presentment must be made in like manner to him also.—C. S. L. C. c. 64, s. 6, 15, 32; C. S. C. c. 57. s. 5; Poth. Ch. n. 137; Chit. B. 187, 188, 262; Sto. B. E. n. 65; 3 Kt. Com. 88; 2 Par. n. 341. [III. 275,]

2307. If a bill of exchange be made payable at any stated place, either by its original tenor or by a qualified acceptance, presentment must be made at such place.—C. S. L. C. c. 64, s. 9, 15; C. S. C. c. 57, s. 4. [III. 277.]

2308. If the bill be payable generally, presentment is made to the drawee or acceptor, as the case may be, either personally, or at his residence, or office, or usual place of business; or if by reason of his absence and not having any known residence, or office, or place of business, or of his death, such presentment can-

not be so made, it may be made at his last known residence, or office, or usual place of business, where the acceptance, or, if there be no acceptance, where the bill bears date.—C. S. L. C. c. 64, § 2. [III. 277.]

2309. If a bill payable generally be accepted before and become due after the appointment duly notified of an assignee to the estate of the acceptor, in the case of an insolvent trader, presentment for payment may be made either to the insolvent or to the assignee personally, or at the residence, or office, or usual place of business of either of them.—Ib. s. 18. [III. 277.]

2310. The acceptor, drawer and indorsers of a bill of exchange are jointly and severally liable to the holder for the payment of it.—The liability of the drawer and indorsers and also of acceptors *supra protest*, is subject to the rules concerning protest and notice herein contained. — Poth. Ch. n. 58, 79, 117; Sto. B. E. 107, 108, 113-118 and cit.; C. Co. 140. [III. 277.]

2311. A third person who becomes warrantor on a bill of exchange, is liable in the same manner and to the same extent as the person in whose behalf he so becomes warrantor.—He is bound by the diligence which binds his principal, and is not entitled to any notice of protest apart from the latter.—Poth. Ch. n. 50, 122, 123; 1 Sav. P. N. 205, 2 Ib. 94; 2 Par. n. 394, 396, 397; Jou. O. 1673, a. 33, p. 131, 132; Sto. B. E. n. 372, 393-5, 454-6; Sto. P. N. n. 460, 484; 1 Bell, Com. 376; C. Co. 141, 142; Marrett vs. Lynch, 9 L. C. R. 353; 10 Lou. R. (O. S.) 374. [III. 277.]

2312. The obligation of the acceptor to pay the bill is primary and unconditional, and legal payment by him discharges the bill with respect to all the parties, unless he is an acceptor for honor, in which case he is substituted in the place of the party for whose honor he accepts and has his recourse against such party also.—The rule above declared is without prejudice to the rights of an acceptor against the party for whose accommodation he has accepted.—2 Nou. 342, 343; Sto. B. E. n. 256, 257, 410, 420, 422; C. 2370. [III. 277.]

2313. Payment by the drawer of an unaccepted bill finally discharges it. If it be accepted he is entitled to recover from the acceptor, unless the acceptance is for his accommodation.—C. 2310; 2 Nou. 350; Sto. B. E. n. 422. [III. 277.]

2314. Payment by an indorser entitles him to recover from the acceptor and drawer and all the indorsers prior to himself; saving the rights of the acceptor for his accommodation.—Author. under a. 2313. [III. 279.]

2315. Payment of a bill must be made upon that part of the set upon which the name of the party paying appears, and such part should be delivered to him, otherwise he will not be discharged from his liability to innocent holders

of such part of the bill.—C. Co. 145, 147. [III. 279.]

2316. Payment of a lost bill of exchange may be recovered upon the holder making due proof of the loss, and also, if the bill be negotiable, on giving security to the parties liable, according to the discretion of the court.—Jou. O. 1673, t. 5, a. 18, 19, 111; 2 Bor. 591; Sm. M. L. 285, 286; Sto. B. E. n. 447 --, Ib. P. N. n. 106 --; C. 1233; C. 150-153. [III. 279.]

2317. Payment may be made of a bill of exchange after protest, by a third person for the honor of any party to it, and the person so paying has his recourse against the party for whom he pays and against all those liable to such party on the bill.—If the person paying do not declare for whose honor he pays, he has his recourse against all the parties upon the bill.—Poth. Cho. n. 170, 171; 2 Par. n. 405; 1 Bell, Com. 312, 334; C. 1141; C. Co. 158, 159. [III. 279.]

2318. Payment of a bill must include the full amount of it with interest from the last day of grace and all expenses of noting, protest and notices legally incurred upon it, with damages in the cases hereinafter stated.—C. S. L. C. c. 64, s. 7, 21. [III. 279.]

SECTION VI.

Of protest for non-payment.

2319. Bills of exchange after presentment for payment, as provided in the fifth section of this chapter, if not then paid, are protested for non-payment, in the afternoon of the last day of grace.—The protest is held to have been made in the afternoon of the day on which it bears date unless the contrary appears on the face of it.—C. 2306, 2307, 2308, 2309; C. S. L. C. ib. s. 16, § 2, s. 17, § 2. [III. 279.]

2320. Protests for non-payment are made by the ministry of the same persons and in the same manner and form as protests for non-acceptance, and are subject to the same rules of proof.—If the bill have been noted for non-acceptance it must be so stated in the protest for non-payment, as declared in article 2300.—C. 2302, 2303, 2304; C. S. L. C. s. 11, 14, 20, 22. [III. 279.]

2321. Bills drawn abroad upon any person in Lower Canada, or payable or accepted at any place therein, are subject, as to all parties therein resident and liable on such bills, to the rules contained in this title with respect to the days of grace and the noting and protesting of bills for non-acceptance and for non-payment, and the notification and service of protests, and also with respect to commission and interest.—C. S. L. C., s. 25. [III. 279.]

2322. In default of protest for non-payment, according to the articles of this section, and of notice thereof, as provided in the section next following, the parties liable on the bill other than the acceptor are discharged, subject nevertheless to the exceptions con-

tained in the two following articles.—C. S. L. C. s. 16, § 2. [III. 279.]

2323. The drawer cannot avail himself of the want of protest or notice, unless he proves that provision was duly made by him for the payment of the bill.—1 L. C. R. The Bank of Montreal, vs. Knapp & al, 252 --; C. Co. 115-117. [III. 281.]

2324. The want of protest and notice is excused when they are rendered impossible by inevitable accident or irresistible force. They may also be waived by any party to the bill, in so far as his rights only are concerned.—Poth. Ch. n. 144; 2 Par. n. 426, 434, 5; Bec. 99, *n.*; Bay. B. 294, 5, (5 Ed.); 3 Kt. Com. 113; Sto. B. E. n. 327. [III. 281.]

2325. Want of protest and notice is not excused by the loss of the bill or by the death or bankruptcy of the drawee or of the party entitled to notice.—Poth. Ch. n. 145, 6; Byles, n. 193; Sto. B. E. n. 326. [III. 281.]

SECTION VII.

Of notice of protest.

2326. Notice of protest for non-acceptance or for non-payment is given at the instance of the holder, or of any party liable on the bill who has received notice and who on paying will be entitled to recover from other parties upon the bill.—Poth. Ch. n. 153; Bay. B. 270, *n.* 147, (6 Ed.); 1 Bell, Com. 330, n. 259; Sto. B. E. n. 291, 303, 304, 388. [III. 281.]

2327. The notice is given by the notary or justice of the peace by whom the protest is made, and such notice, together with the certificate of service thereof, is in the form prescribed in the act intituled: *An act respecting bills of exchange and promissory notes.*—C. S. L. C. c. 64, s. 22; C. 2303, 2304. [III. 281.]

2328. The notice is given to the party entitled thereto personally, or at his residence, or office, or usual place of business, and in case of death or absence at his last residence, office, or place of business; or the notice, directed to the party, may be deposited in the nearest post-office communicating with his actual or last residence, office, or place of business as aforesaid, as the case may be; the postage being prepaid.—Ib. s. 13. [III. 281.]

2329. In the case of an insolvent trader the notice may be given as provided in the last preceding article, or to the assignee of the insolvent estate, provided the bill were drawn or endorsed by the insolvent before the assignment, or the attachment in compulsory liquidation.— Ib. s. 13, § 2. [III. 281.]

2330. Service of the notice of protest, whether for non-acceptance or for non-payment may be made at any time within three days next after the day on which the bill is protested. —Ib. s. 19. [III. 281.]

2331. The party notified is

bound to give notice, within a reasonable delay, to any parties to the bill whom he intends to hold liable upon it, other than the acceptor.—Poth. Ch. n. 148-153; Chit. B. 520, 521 (8 Ed.); 3 Kt. Com. 108, 109; Sto. B. E. n. 384; C. Co. 164. [III. 283.]

SECTION VIII.

Of interest, commission and damages.

2332. The amount of interest which may lawfully be paid upon the principal sum of a bill of exchange, for the discount thereof, may be taken at the time of discounting.—C. S. L. C. c. 64, s. 26. [III. 283.]

2333. Any person who discounts or receives a bill of exchange payable in Lower Canada, at a distance from the place where it is discounted or received, may take or recover, besides interest, a commission sufficient to defray the expenses of agency and exchange in collecting the bill. Such commission not in any case to exceed one per cent on the amount of the bill.—This article does not apply to banks, which are subject to the provisions contained in the next following article.—Ib. s. 27; C. S. C. c. 58, s. 4, 5, 7. [III. 283.]

2334. Banks in this province discounting bills of exchange may receive, for defraying the expenses attending their collection, a commission on the amount according to the rates and in the manner prescribed in the act intituled *An act respecting interest*.—C. S. C. c. 58, s. 5, 7, c. 55, s. 110. [III. 283.]

2335. Bills drawn for an usurious consideration are not void in the hands of an innocent holder for valid consideration.—C. S. L. C. c. 64, s. 28. [III. 283.]

2336. Bills of exchange drawn, sold, or negotiated within Lower Canada, which are returned under protest for non-payment, are subject to ten per cent damages if drawn upon persons in Europe, or the West Indies, or in any part of America not within the territory of the United States or British North America.—If drawn upon persons in Upper Canada, or in any other of the British North American Colonies, or in the United States, and returned as aforesaid, they are subject to four per cent damages. — With interest, at six per cent, in each case from the date of the protest.—Ib. s. 1. [III. 283.]

2337. The amount of damages and interest specified in the last preceding article is reimbursed to the holder of the bill at the current rate of exchange of the day when the protest is produced and repayment demanded; the holder being entitled to recover so much money as will be sufficient to purchase another bill drawn on the same place and at the same term for a like amount, together with the damages and interest and also the expenses of noting and protesting and of postages thereon,—Ib. s. 1, § 2. [III. 283.]

2338. When notice of the

protest of a bill returned for non-payment is given by the holder thereof to any party secondarily liable upon it, in person or by writing delivered to a grown person at his counting-house, or dwelling-house, and they disagree as to the rate of exchange, the holder and the party notified appoint each an arbitrator to determine the rate; these in case of disagreement appoint a third, and the decision of any two of them given in writing to the holder is conclusive as to the rate of exchange, and regulates the sum to be paid accordingly.—Ib. s. 2. [III. 283.]

2339. If either the holder or the party notified, as provided in the last preceding article, fail, for the space of forty-eight hours after the notification, to name an arbitrator on his behalf, the decision of the single arbitrator on the other part is conclusive.—Ib. s. 2, § 2. [III. 285.]

SECTION IX

General provisions.

2340. In all matters relating to bills of exchange not provided for in this code recourse must be had to the laws of England in force on the thirtieth day of May, one thousand eight hundred and forty-nine.—Ib. s. 30. [III. 285.]

2341. In the investigation of facts, in actions or suits founded on bills of exchange drawn or endorsed either by traders or other persons, recourse must be had to the laws of England in force at the time specified in the last preceding article, and no additional or different evidence is required or can be adduced by reason of any party to the bill not being a trader.—Ib. s. 30, s. 2; C. 1246. [III. 285.]

2342. The parties in the actions or suits specified in the last preceding article may be examined under oath as provided in the title *Of Obligations*.—Ib. s. 30, § 3. [III. 285.]

2343. The rules concerning the prescription of bills of exchange are contained in the title *Of Prescription*.—C. 2260. [III. 285.]

CHAPTER SECOND.

OF PROMISSORY NOTES.

2344. A promissory note is a written promise for the payment of money at all events, and without any condition. It must contain the signature or name of the maker and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules.—Poth. Ch. n. 216; 2 Par. n. 478; Bay. B. 1; Sto. P. N. n. 1; C. 2279. [III. 285.]

2345. The parties to a promissory note at the time of making it are the maker and the payee. The maker is subject to the same obligations as the acceptor of a bill of exchange.—Bay. B. 169; Sto. P. N. n. 4; C. S. L. C. c. 64. [III. 285.]

2346. The provisions concerning bills of exchange contained in this title apply to promissory notes when they

relate to the following subjects, viz.:

1. The indication of the payee;
2. The time and place of payment;
3. The expression of value;
4. The liability of the parties;
5. Negotiation by endorsement or delivery;
6. Presentment and payment;
7. Protest for non-payment and notice;
8. Interest, commission, or usury;
9. The law and the rules of evidence to be applied;
10. Prescription. [III. 285.]

2347. Parties liable on promissory notes made payable on demand are not entitled to days of grace for the payment thereof.—C. S. L. C. c. 64, s. 6, § 2. [III. 287.]

2348. The making, circulation, and payment of bank notes are regulated by the provisions of a statute intituled *An act respecting banks and freedom of banking*, and by the special acts of incorporation of the banks respectively.—C. S. C. c. 55. [III. 287.]

CHAPTER THIRD.

OF CHEQUES.

2349. A cheque is a written order upon a bank or banker for the payment of money. It may be made payable to a particular person, or to order, or to bearer, and is negotiable in the same manner as bills of exchange and promissory notes. —Chit. B. 545, Chit. & H. 24; Ros. B. 9; 2 Par. 464-467; Sto. P. N. n. 488, 490, 491. [III. 287.]

2350. Cheques are payable on presentment, without days of grace.—Author. under n. 2349. [III. 287.]

2351. The holder of a cheque is not bound to present it for acceptance apart from payment; nevertheless, if it be accepted, he has a direct action against the bank or banker, without prejudice to his claim against the drawer, either upon the cheque or for the debt on account of which it was received.—Poth. Ch. n. 230, 232; Sto. P. N. n. 494. [III. 287.]

2352. If the cheque be not presented for payment within a reasonable time, and the bank fail between the delivery of the cheque and such presentment, the drawer or indorser will be discharged to the extent of the loss he suffers thereby.—Poth. Ch. n. 229; Chit. & H. 32, 48; Sto. P. N. n. 493, 498; 3 Kt. Com. 104, n. D; C. 2323. [III. 287.]

2353. Subject to the provisions contained in the last preceding article, the holder of a cheque who has received it from the drawer, may upon refusal of payment by the bank or banker return it to the drawer with reasonable diligence, and recover the debt for which it was given, or he may retain the cheque and recover upon it without protest. —If the cheque be received from any other party than the drawer, the holder may in like manner return it to such party, or he may recover from the

parties whose names are upon it as in the case of an inland bill of exchange.—Poth. Ch. n. 229; 1 Sav. 238, 244; 2 Ib. 166, 169, 715, 719, 745, 748; Sto. P. N. n. 498. [III. 287.]

2354. In the absence of special provisions in this section, cheques are subject to the rules concerning inland bills of exchange in so far as their application is consistent with the usage of trade.—1 Chit. & H. 24; Ros. B. 9; Sm. M. L. 206; 3 Kt. Com. 75, 77; Sto. P. N. n. 488, 489. [III. 287.]

TITLE SECOND.

OF MERCHANT SHIPPING.

2355. The act of the imperial parliament intituled: *The Merchant Shipping Act*, 1854, contains the law concerning British ships in Lower Canada in all matters to which its provisions extend and are applicable therein.—I. S. 17, 18 V. c. 104. [III. 289.]

CHAPTER FIRST.

OF THE REGISTRATION OF SHIPS.

2356. British ships must be registered in the manner and according to the rules and forms prescribed in the act referred to in the last preceding article.—Vessels under fifteen tons and vessels under thirty tons burthen, employed respectively in the particular navigation or in the coasting trade specified by the said act, are not subject to be registered.—M. S. A. 1854, pt. 2, s. 17, 19, § 2, 3; Abbott, pt. 1, c. 2. [III. 289.]

2357. All persons claiming property in any vessel of over fifteen tons burthen navigating the inland waters of this province, and not registered as a British ship, must cause their ownership to be registered and obtain a certificate of such registry from the person authorized to grant the same; the whole in the manner and according to the rules and forms prescribed in the act intituled: *An act respecting the registration of inland vessels.*—C. S. C. c. 41, s. 1-6.—[III. 289.]

2358. The special rules concerning the measurement of vessels of the description mentioned in the last preceding article and concerning builders' certificates, change of masters and change in the names of such vessels, and the granting of certificates of ownership and indorsements thereof, and with respect also to the authority and duties of collectors and other officers in relation thereto, are contained in the act last referred to.—Ib. s. 7-12, 19-21, 28. [III. 289.]

CHAPTER SECOND.

OF THE TRANSFER OF REGISTERED VESSELS.

2359. The transfer of registered British ships can be made only by a bill of sale executed in the presence of one or more witnesses, containing the recital specified in the act of the imperial parliament, intituled: *The Merchant Shipping Act*, 1854, and entered in the book of registry of ownership in the manner in the said act provided. The rules respecting the persons qualified to make and receive such transfers and respecting the registry and certificate of ownership and priority of right are contained in the said act.—I. S. 17, 18 V. c. 104, s. 81, n. 10, 11; Sm. M. L. 30, 193, 4; Abbott, 57, 58. [III. 289.]

2360. The transfer between British subjects of registered colonial vessels navigating the inland waters of this province, not registered as British ships, can be made only by a bill of sale or other instrument in writing containing the recital specified in the act of the provincial parliament intituled: *An act respecting the registration of inland vessels*, and entered in the book of registry of ownership, in the manner in the said act provided.—C. S. C. c. 41, s. 13, 16. [III. 289.]

2361. Transfers of ships and vessels of the description specified in the last two preceding articles, not made and registered in the manner therein respectively prescribed, do not convey to the purchaser any title or interest in the ship or vessel intended to be sold.—I. S. 1. c. s. 43; C. S. C. 1. c.; Sm. M. L. 1. c. p. 33; Abbott 1. c. [III. 291.]

2362. No transfer of a fractional part of one of the sixty-four shares into which registered ships and vessels are by law divided can be made or registered; nor can any number of persons greater than thirty-two be, by reason of any sale, registered as owners of any such ship or vessel at the same time.—I. S. s. 37, n. 1, 2; C. S. C. s. 14, 15. [III. 291.]

2363. When the persons registered as legal owners of the shares in an inland vessel do not exceed thirty-two in number, the equitable title of minors, heirs, legatees, or creditors exceeding that number, duly represented by or holding from such owners, or any of them, is not affected.—C. S. C. c. 41, s. 15; M. S. A. 1854, s. 37, § 2. [III. 291.]

2364. If at any time the property of any owner of an inland vessel cannot be reduced by division into any number of integral sixty-fourth shares, his right of ownership to the fractional parts is not affected by reason of their not having been registered.—C. S. C. c. 41, s. 14, § 2. [III. 291.]

2365. Any number of owners named in the certificate of ownership being partners in a copartnership carrying on trade in any part of the queen's dominions, may hold any inland vessel or any share thereof in the name of such partnership as joint owners thereof, without

designating the separate interest of each, and the vessel so held is deemed to be in all respects partnership property. —Ib. c. 41, s. 14, § 3. [III. 291.]

2366. When the bill of sale for the transfer of any vessel, or any share thereof, is entered in the book of registry of certificates of ownership, it passes the property intended to be transferred, to all intents and against every person except subsequent purchasers and mortgagees who first procure the endorsement to be made upon the certificate of ownership, as hereinafter mentioned. —Ib. c. 41, s. 17. [III. 291.]

2367. When a bill of sale for the transfer of any inland vessel, or of any share thereof, has been entered in the book of registry of certificates of ownership, no other bill of sale for the transfer of the same vessel or same share thereof from the same vendor or mortgageor to any other person shall be entered, unless thirty days have elapsed from the day of the first entry, or from the arrival of the vessel in the port to which she belongs, if at the time of the first entry she were absent from such port. When there are more than two such transfers, the same delay of thirty days must be observed in making each successive entry thereof.—Ib. c. 41, s. 18. [III. 291.]

2368. When there are two or more transfers of the same property in any vessel by the same owner, an indorsement is made by the proper officer, upon the certificate of ownership of such vessel, of the particulars of that bill of sale under which the person claims who produces the said certificate within thirty days next after the entry of his bill of sale in the book of registry, or within thirty days next after the return of the vessel to the port to which she belongs, in case of her absence at the time of such entry; and if the certificate be not produced within the said delay, the endorsement is then made to the person who first produces it for that purpose.—Ib. s. 18, § 2. [III. 291.]

2369. In the case specified in the last preceding article the priority of right among the claimants is determined, not by the order of time in which the particulars of the respective bills of sale are entered in the book of registry, but by the time when the indorsement is made upon the certificate of ownership.—Ib. s. 18, § 2. [III. 293.]

2370. The proper officer may, in the cases and subject to the rules specified in the act respecting the registration of inland vessels, extend the delay allowed by law for the recovery of a certificate lost or detained, or for the registry of ownership *de novo*.—Ib. s. 18, § 2, 3. [III. 293.]

2371. When a transfer of a vessel, or of any share thereof, is made only as a security for the payment of money, a statement to that effect must be made in the entry of such transfer in the book of registry, and also in the indorsement on the certificate of ownership; and the

person to whom such transfer is made, or any person claiming under him by reason thereof, is not deemed to be the owner of such vessel or share, except in so far only as may be necessary for rendering the same available, by sale or otherwise, for the payment of the money so secured. — Ib. s. 23. [III. 293.]

2372. When a transfer of the description specified in the last preceding article is made and duly registered, the right or interest of the person to whom it is made is not affected by any act of bankruptcy committed by the person making it after the registry thereof, although the latter, at the time of becoming bankrupt, be the reputed owner of the vessel or share, and have the same in his possession or disposition.—Ib. s. 24. [III. 293.]

2373. Vessels built in this province may also be transferred in security for loans in the manner declared in the next following chapter. [III. 293.]

CHAPTER THIRD.

OF THE MORTGAGE AND HYPOTHECATION OF VESSELS.

2374. The rules concerning the hypothecation of vessels by contract of bottomry are contained in the title *Of Bottomry and Respondentia*.—The mortgage and hypothecation of registered British ships are made according to the provisions contained in the act of the imperial parliament, intituled: *The Merchant Shipping Act*, 1854.—M. S. A. s. 66--; [III. 293.]

2375. Vessels built in this province may be mortgaged, hypothecated, or transferred, under the authority of the act intituled: *An act for the encouragement of ship-building*, according to the rules laid down in the following articles of this chapter.—C. S. C. c. 42. [III. 293.]

2376. So soon as the keel of a vessel is laid within this province, the owner thereof may mortgage, hypothecate and grant a privilege or lien on the same, to any person contracting to advance money or goods for the completion thereof, and such mortgage, hypothec and privilege attaches to the vessel during her construction and afterwards, until it is removed by payment or otherwise.—Ib. c. 42, s. 1. [III. 295.]

2377. After the first grant no other mortgage, hypothecation and privilege, of the description specified in the last preceding article, can be granted without the consent of the first advancer; if any subsequent grant be made without such consent it is void.—Ib. c. 42, s. 1, § 2. [III. 295.]

2378. The contracting parties may agree that the vessel whereof the keel is laid shall be the property of the party advancing money or goods for the completion thereof, and such agreement *ipso facto* transfers to the advancer, for security of his advances, not only the property of the portion of the vessel then con-

structed, but of such vessel up to and after completion, so that the advancer may obtain the register of such vessel, sell the same and grant a good and clear title therefor; saving the right of the owner to his action of account or other legal remedy against the advancer.—Ib. s. 2. [III. 295.]

2379. The first advancer may in like manner mortgage, hypothecate and grant a privilege or lien on the vessel, or transfer it to any subsequent advancer; and so may any subsequent advancer to another, provided the formalities hereinafter prescribed are followed but not otherwise; in such case the owner has his recourse against the first and subsequent advancers for an account, jointly and severally. —Ib. s. 3. [III. 295.]

2380. Every contract made under the authority of article 2375 and of the act therein specified must be passed before a notary or in duplicate before two witnesses, and the contract or a memorial thereof must be registered, in the manner and according to the rules prescribed in the said act, in the registry office of the county or place where the vessel is built. Such contract and the rights thereon avail only from the date of registration, and in default of registration the parties are not entitled to the benefit intended by the said act, and declared in the last four preceding articles.—Ib. c. 42, s. 5, 6. [III. 295.]

2381. Registry of the vessel is granted by the proper officer to the advancer, or, if there be more than one, to the advancer last in date whose contract is duly registered, on his producing an authentic copy of the contract, or the original contract when not notarial, with the certificate of registration thereof endorsed thereon, and the builders certificate. —If the owner produce a certificate that no contract of the description specified in article 2380 has been registered, and also the builders certificate, he is entitled to obtain the registry of the vessel.—Ib. s. 4. [III. 295.]

2382. The provisions contained in the foregoing articles of this chapter, and in the act therein referred to, do not deprive any party of any right, lien, privilege, or hypothec which by law he had before the time of the registration of any contract of the nature specified in the said articles, nor deprive any person of a right to have an account, when by law he is entitled thereto. —Ib. s. 7. [III. 295.]

CHAPTER FOURTH.

OF PRIVILEGE AND MARITIME LIEN UPON VESSELS AND UPON THEIR CARGO AND FREIGHT.

2383. There is a privilege upon vessels for the payment of the following debts:—

1. The costs of seizure and sale, according to article 1995;

2. Pilotage, wharfage, and harbor dues, and penalties for the infraction of lawful harbor regulations;

3. The expense of keeping

the vessel and rigging, and of repairing the latter since the last voyage;

4. The wages of the master and crew for the last voyage;

5. The sums due for repairing and furnishing the ship on her last voyage, and for merchandise sold by the captain for the same purpose;

6. Hypothecations upon the ship, according to the rules declared in the third chapter of this title and in the title *Of Bottomry and Respondentia;*

7. Premiums of insurance upon the ship for the last voyage;

8. Damages due to freighters for not delivering the goods shipped by them, and in reimbursement for injury caused to such goods by the fault of the master or crew.—If the ship sold have not yet made a voyage, the seller, the workmen employed in building and completing her, and the persons by whom the materials have been furnished, are paid by preference to all creditors, except those for debts enumerated in paragraphs 1 and 2.—ff. L. 26; L. 34, de reb. auct.; L. 5; L. 6, qui pot. in pig.; 1 Va. 66, 362, a. 16, 367, a. 17; Poth. Ass. n. 192; 1 Em. 85, 86, 584--, c. 12; O. M. t. Des navires, a. 2, 3, & l. 3, t. 4, a. 19; Abbott, 105, 531, 532--; 2 Bell, Com. 512--; C. Co. 191; 3 Par. 612--; Flan. 166-7-8, 179, 180, 318-320, 324; Sm. M. L. 324, 457; I. S. 17 & 18 V. c. 104, s. 191; Toub. pt. 2, p. 305; Guy. Privilége sur bâtiments. [III. 297.]

2384. A ship's-husband, or other agent, holding the ship's papers, has a lien upon them for advances and charges due for the management of the business of the ship.—1 Bell, Com. 512; C. 1713, 1722. [III. 297.]

2385. The following debts are paid by privilege upon the cargo:

1. Costs of seizure and sale;

2. Wharfage;

3. Freight upon the goods, according to the rules declared in the title *Of Affreightment*, and what is due for the passage of the owner;

4. Loans upon respondentia;

5. Premiums of insurance upon the things insured.—C. 2453, 2382. [III. 297.]

2386. The following debts are paid by privilege upon the freight:

1. The cost of seizure and distribution;

2. The wages of the master and of the seamen and others employed in the vessel;

3. Loans on bottomry according to the rules contained in the title *Of Bottomry and Respondentia.* — C. 2382. [III. 297.]

2387. The order of privileges declared in the foregoing articles is without prejudice to claims for damage by collision, or for average contributions, or for salvage, which are paid by privilege after the debts enumerated as 1, 2, in articles 2383 and 2385, and before or after other privileged debts, according to the circumstances under which the claim has arisen, and the usage of trade. —2 Va. t. Des naufrages, a. 24,

26, 617; 2 Em. 613; Abbott, 532, 535; 1 Bell, 583, 589, 2 Ib. 103; Mac. 287, 288; M. S. A. 1854, pt. 8, s. 468. [III. 297.]

2388. The provisions contained in this chapter do not apply in cases before the Court of Vice- Admiralty.—Cases in that court are determined according to the civil and maritime laws of England.—St. V. A. Rep. 376, Mary-Jane, 267, Hercyna, 275, 6. [III. 299.]

CHAPTER FIFTH.

OF OWNERS, MASTERS AND SEAMEN.

2389. The owners, or a majority of them, appoint the master and may discharge him without assigning any cause unless it is otherwise specially agreed. — 1 Va. t. Propriétaires, a. 4, 571, 573, 4; Ib. t. Saisie des vaisseaux, a. 13, 538, 9; C. Co. 218; 1 Bell, Com. 506, 508; Mac. 186; 3 Kt. 162. [III. 299.]

2390. The owners are civilly responsible for the acts of the master in all matters which concern the ship and voyage and for damages caused by his fault or the fault of the crew.—They are responsible in like manner for the acts and faults of any person lawfully substituted to the master.—The whole nevertheless subject to the provisions contained in this chapter and in the titles *Of Affreightment*, and *Of Bottomry and Respondentia* and in *The Merchant Shipping Act*, 1854. —ff. L. 1, § 1, 3, 5, 7, 11, 17, de act.; Vin. in Pek. t. de exer. act. fol. 149, 153; 1 Va. t. Propriétaires, a. 2, 568, 9; Mac. 105, 121, 128, 152, 3; Sto. Part. § 455, 456, 458; 1 Bell, Com. 522-5, 559; Abbott, c. 6, 7; 3 Kt. 133, 161, 162, 176; C. Co. 216; C. 2432-5, 2603, 4; M. S. A. 1854, pt. 9. [III. 299.]

2391. Any person who hires a vessel to have the exclusive control and navigation of it, is held to be the owner from the time of such hiring, with the rights and liabilities of an owner as respects third persons.—ff. L. 1, § 15, de exer. act.; Abbott, 35, 208; 1 Bell, Com. 521; 3 Kt. 137, 8; C. 2408. [III. 299.]

2392. In matters of common interest to the owners concerning the equipment and management of the vessel, the opinion of the majority in value governs, unless there is an agreement to the contrary.—If there be an equal division on the question whether the ship shall be employed or not, the opinion in favor of employment prevails; saving, in both cases, to the owners who object the right to claim exemption from liability, and indemnity according to the circumstances and the discretion of a competent court.—Cod. L. ult. qui bon. ced. poss.; 1 Va. t. Propriétaires, a. 5, 575, 582, 584; Cleirac, a. 59; Str. pt. 2, n. 6; C. Co. 220; 1 Bou. Pat. 339, 347; 3 Par. n. 621; Abbott, pt. 1, c. 3; 1 Bell, Com. 502, 3; Ersk. Inst. b. 3, t. 3, § 56; 3 Kt. 151 --; Levi, 209, n. 35-37; Sto. Part. § 429, 430, 434. [III. 299.]

2393. The sale of a ship

by licitation cannot be ordered unless it is demanded by the owners of at least one half of the total interest in the ship, save in the case of an agreement to the contrary.—1 Va. t. Propriétaires, a. 6, 584; C. Co. 220; 3 Par. n. 623; Mol. b. 2, c. 1, § 2, 3, 308, 310; Sto. Part. § 437-439. & cit.; Ersk. Inst. b. 3, t. 3, § 56; 1 Bell, Com. 504. [III. 301.]

2394. The general powers of the master to bind the owner of the ship personally, and their mutual obligations toward each other are governed by the rules contained in the title *Of Lease and Hire*, and in the title *Of Mandate*, respectively. — C. 1666 --, 1705, 1715, 1727 --. [III. 301.[

2395. The master is personally liable to third persons for all obligations contracted by him respecting the ship, unless by express terms the credit is given to the owners only.—ff. L. 1, § 17, De exer. act; 1 Va. 569; 1 Bell, Com. 508, 511, 519, 522; 3 Kt. 161; Abbott, 97, 98; Mac. 104, 121, 128. [III. 301.]

2396. The master engages the crew for the ship. This he does nevertheless in concert with the owners or ship's-husband when they are present at the place.—O. M. l. 2, t. 1, a. 5, 8, 1 Va. 384, 393; Ib. l. 3, t. 4. a. 1, 1 Va. 675; M. S. A. 1854, s. 149; C. Co. 233; Par. n. 629. [III. 301.]

2397. The master is bound to see that the ship is properly furnished and prepared for the voyage, but if the owners or ship's-husband be present at the place, the master cannot, without special authority, cause extraordinary repairs to be made upon the ship, or buy sails, cordage or provisions for the voyage, nor borrow money for that purpose; subject to the exception contained in article 2604.—C. 2395; 1 Va. l. 2, t. 1, a. 17, 18, p. 439, 440; Mac. 131-133; 1 Bell, Com. 524, 525. [III. 301.]

2398. He is bound to sail on the day appointed and to pursue his voyage without deviation or delay, subject to the conditions contained in the title *Of Affreightment*.—C. 2410, 2411, 2426, 2444, 2447, 2448, & auth. cit.; C. Co. 238. [III. 301.]

2399. He may, during the voyage, in cases of necessity, borrow money or, if that be impossible, sell part of the cargo to repair the ship or to supply her with provisions or other necessary things.—C. 2449, & auth. cit.; C. Co. 234; Par. n. 606; 1 Bell, 525, 528, 536; 3 Kt. 173; Abbott, 274, 275; Tud. 66. [III. 301.]

2400. He cannot sell the ship without special authority from the owners, except in case of inability to prosecute the voyage, and manifest and urgent necessity for the sale.—Abbott, 11, 12, 14; Mac. 148-150; 1 Bell, 536; C. Co. 237; 3 Kt. 174, 175; Tud. 67, 68; 1 Va. t. Capitaine, a. 19, 441, 443, 444. [III. 301.]

2401. The master has all the authority over the seamen and other persons in the ship including the passengers, which is necessary for its safe navigation, management and pre-

servation, and for the maintenance of good order.—O. M. l. 2, t. 1, a. 22; 1 Va. 449, 450; Cas. disc. 136, n. 14; Abbott, 129, 130, 160; Mac. 182 --; Par. n. 638, 697. [III. 301.]

2402. He may throw over board a part or the whole of the cargo in cases of imminent danger and when necessary for the preservation of the ship.—ff. L. 1, de leg. Rhod. de jac.; O. M. l. 3, t. 8, a. 1; 2 Va., 188; C. Co. 410; Par. n. 734; Mac. 142; Abbott, pt. 4, c. 10, 361 --. [III. 303.]

2403. The rights, powers and obligations of the owners and of the master with respect to the ship and cargo are further declared in the titles *Of Affreightment* and *Of Insurance*. —The rules concerning the master's powers to hypothecate the ship or cargo are declared in the title *Of Bottomry and Respondentia*.—C. 2408, 2420, 2423 --, 2442 --, & 2603, 2604. [III. 303.]

2404. The special duties of masters, with respect to the keeping of official log-books and in other matters not herein provided for, the engagement and treatment of seamen, the payment and disposal of their wages and their discharge are regulated by the provisions contained respectively in the act of the imperial parliament intituled: *The Merchant Shipping Act*, 1854, and the act of the parliament of Canada intituled: *An act respecting the shipping of seamen*.—M. S. A. 1854, pt. 3; 18 and 19 V. c. 91; 25 and 26 V. c. 63; C. S. L. C. c. 55. [III. 303.]

2405. Wages not exceeding ninety-seven dollars and thirty-three cents due to any seamen for service in a vessel registered in or belonging to Lower Canada may be recovered before two justices of the peace in the manner and according to the rules and forms prescribed in the act intituled: *An act respecting the recovery of seamen's wages in certain cases*.—C. S. L. C. c. 57. [III. 303.]

2406. Prescription does not begin to run against the claim of seamen for their wages until after the expiration of the voyage.—Poth. L. Mar. 228. [III. 303.]

TITLE THIRD.

OF AFFREIGHTMENT.

CHAPTER FIRST.

GENERAL PROVISIONS.

2407. Contracts of affreightment are either by charter-party, or for the conveyance of goods in a general ship. —1 Va. 618; Poth. L. Mar. n. 3, 4; Sm. M. L. 299; Abbott, 90, 168, 233. [III. 303.]

2408. The contract may be made by the owner or the master of the ship or by the ship's-husband as agent of the former. —If made by the master, it binds himself, and also the owner of the ship; unless it is made at a place where the owner or ship's-husband is present, and they disavow the contract, in which case it binds the master only.—If the ship be hired by a party who sublets it, he is subject in contracts of affreightment to the same rules as if he were owner. —ff. L. 1, § 7, 15, de exer. act.; Dom. l. 1, t. 16, s. 3, n. 2, 3; O. M. l. 3, t. 1, a. 2; 1 Va. 621, 622; Abbott, 90-92, 172; 3 Kt. 162; Sto. Ag. n. 35, *n.* 3, n. 116, 118; Sm. M. L. 299; Poth. L. Mar. n. 19, 46-48; C. Co. 232; 2 Bou.-Pat. 50, 54-56; 3 Par. 165; Mac. 164-166; 1 Bell, Com. 504. [III. 303.]

2409. The ship, with her equipments, and the freight are bound to the performance of the obligations of the lessor, and the cargo to the performance of the obligations of the lessee, or freighter.—Cleirac, a. 2, des Jug. d'Ol. n. 3, 86, a. 28, t. de la navig. des riv. 597; Va. O. M. a. 11, 629, 630; Abbott, 204, 205; C. Co. a. 191, 280; Patterson vs. Davidson, 2 Rev. 77. [III. 305.]

2410. If before the departure of the vessel there be a declaration of war or interdiction of trade with the country to which she is destined, or by reason of any other event of irresistible force, the voyage cannot be prosecuted, the contract is dissolved, without either party being liable in damages. —The expense of loading and unloading the cargo is borne by the freighter. — 1 Va. t. Ch. Part. a. 7, 626; Poth. L. Mar. n. 98, 99; C. Co. 276; Abbott, 426; 3 Kt. 248, 249; 2 Bou.-Pat. 288, 289. [III. 305.]

2411. If the port of destination be closed, or the ship detained by irresistible force, for a time only, the contract subsists and the master and freighter are mutually bound to await the opening of the port and the liberation of the ship; without either of them being entitled to damages. The rule applies equally if the obstruction arise during the voyage; and no increase of freight can be demanded. —1 Va. t. Ch. Part. a. 8; Poth. L. Mar. 100; C. Co. 277; Abbott, 427, 428; 3 Kt. 249. [III. 305.]

2412. The freighter may nevertheless unload the goods during the detention of the ship for the causes stated in the last preceding article; subject to the obligation of reloading after the obstruction has ceased, or of indemnifying the lessor for the full freight; unless the goods are of a perishable nature and cannot be replaced, in which case freight is due only to the place of the discharge.—1 Va. t. Ch.-Part. a. 9, 628; Poth. L. Mar. n. 101, 102; C. Co. 278; Abbott, 428, 429; 3 Kt. 249; 3 Par. n. 714, p. 182. [III. 305.]

2413. Contracts of affreightment and the obligations of the parties under them, are subject to the rules relating to

carriers contained in the title *Of Lease and Hire*, when these are not inconsistent with the articles of this title. [III. 305.]

CHAPTER SECOND.

OF CHARTER-PARTY.

2414. Affreightment by charter-party may be either of the whole ship or of some principal part of it, and for a determined voyage or a specified time.—Poth. L. Mar. n. 3, 4; Mac. 307; Abbott, 168; Sm. M. L. 299. [III. 305.]

2415. The charter-party, or memorandum of charter-party, usually specifies the name and burden of the ship, with a stipulation that she is tight and staunch and well furnished and equipped for the voyage. It also contains stipulations as to the time and place of loading, the day of sailing, the rate and payment of freight, and the conditions of demurrage, with a declaration of the fortuitous events which exempt the lessor from liability, and such other covenants as the parties may see fit to add.—1 Va. t. Ch.-Part. a. 3, 618, 623; Poth. L. Mar. n. 13--; C. Co. 373; Abbott, 172, 173; Sm. M. L. 300, 301, *n.* C; 3 Kt. 203, 204; 2 Bou.-Pat. 267-9; 3 Par. n. 708, p. 168, 170. [III. 305.]

2416. If the time of loading and unloading the ship, and the demurrage be not agreed upon, they are regulated by usage.—O. M. a. 4, 1 Va. 624; Abbott, 227, 8; C. Co. 274. [III. 307.]

2417. When goods are put on board of a ship in pursuance of a charter-party the master signs a bill of lading for them to the effect mentioned in article 2420.—O. M. t. 2, a. 1, 1 Va. 631, 2; Poth. L. Mar. n. 16; Abbott, 198; C. 2420. [III. 307.]

2418. If the whole of the ship be leased, but it be not wholly loaded by the lessee, the master cannot receive other cargo without his consent; in case of any other cargo being received the lessee is entitled to the freight of it.—O. M. t. 3, a. 2; 1 Va. 641; Poth. L. Mar. n. 20-24; C. Co. 287; Sm. M. L. 303; Abbott, 311. [III. 307.]

CHAPTER THIRD.

OF THE CONVEYANCE OF GOODS IN A GENERAL SHIP.

2419. The contract for the conveyance of goods in a general ship is that by which the master or the owner of a ship destined for a particular voyage engages separately with various persons, unconnected with each other, to convey their respective goods according to the bill of lading to the place of their destination, and there to deliver them.—Abbott, 233; Sm. M. L. 305. [III. 307.]

CHAPTER FOURTH.

OF THE BILL OF LADING.

2420. The bill of lading is signed and delivered by the master or purser, in three or more parts, of which the master retains one; the freighter also

keeps one, and sends one to the consignee.—Besides the names of the parties and of the ship, it states the nature and quantity of the goods shipped, with their marks and numbers in the margin, and the place of their delivery, the name of the consignee, the place of shipping and of the ship's destination, with the rate and manner of payment of the freight, and primage and average.—1 Va. t. Connaissement, a. 1-3, p. 631-4; Poth. L. Mar. n. 17; C. Co. 281, 2; Abbott, 234; Sm. M. L. 306. [III. 307.]

2421. When by the bill of lading the delivery of the goods is to be made to a person named or to his assigns, such person may transfer his right by endorsement and delivery of the bill of lading, and the ownership of the goods and all rights and liabilities in respect thereof are held to pass thereby to the indorsee; subject nevertheless to the rights of third persons.—C. Co. 281; 3 Par. 727; 2 Bou.-Pat. 313, 4; Abbott, 246, 247; Sm. M. L. 309; I. S. 19, 20 V. c. 111, s. 1. [III. 307.]

2422. The freighter or lessee upon the signing and delivery to him of the bill of lading, is bound to return the receipts given by the master for the goods shipped. The bill of lading, in the hands of a consignee or endorsee, is conclusive evidence against the party signing it; unless there is fraud, of which the holder is cognizant.—1 Va. 638; C. Co. 283; Abbott, 238; Mac. 339, 340; I. S. 19, 20 V. c. 111. [III. 307.]

CHAPTER FIFTH.

OF THE OBLIGATIONS OF THE OWNER OR LESSOR AND OF THE MASTER.

2423. The lessor is obliged to provide a vessel of the stipulated burthen, tight and staunch, furnished with all tackle and apparel necessary for the voyage, and with a competent master and a sufficient number of persons of skill and ability to navigate her, and so to keep her to the end of the voyage. The master is obliged to take on board a pilot, when by the law of the country one is required.—O. M. t. Fret, a. 12, p. 653; Poth. L. Mar. n. 30; Abbott, 254, 257; 3 Kt. 203, 205, 206. [III. 309.]

2424. The master is obliged to receive the goods, and carefully arrange and stow them in the ship, and to sign such bills of lading as may be required by the freighter or lessee, according to article 2420, upon receiving from him the receipts given for the goods.—Poth. L. Mar. n. 27, 28; Abbott, 234; Sm. M. L. 312. [III. 309.]

2425. The goods must not be stowed on deck without the consent of the freighter, unless in a particular trade or in inland or coasting voyages, where there is an established usage to that effect. If without such consent or usage the goods be so stowed and are lost by peril of the sea the master is personally liable.—1 Va. t. Capitaine, a. 12, 397; C. Co. 229; Abbott, 366, 367, *n.* f.; 3 Kt. 206; Gaherty & Torrance

et al. 13 L. C. R. 401. [III. 309.]

2426. The ship must sail on the day fixed by the contract, or, if no day be fixed, within a reasonable time, according to circumstances and usage; and must proceed to her destination without deviation. If by the fault of the master the ship be delayed in her departure, or during the voyage, or at the place of discharge, or any loss or injury occur, he is liable in damages. —O. M. t. Fret, a. 12, 1 Va. 650; Poth. L. Mar. n. 29; Abbott, 261, 271, 273; Sm. M. L. 313; 3 Kt. 209, 210. [III. 309.]

2427. The master is obliged to exercise all needful care of the cargo, and, in case of wreck, or other obstruction to the voyage by a fortuitous event or irresistible force, he is obliged to use the diligence and care of a prudent administrator for the preservation of the goods, and for their conveyance to the place of destination, and for that purpose to engage another ship, if it be necessary.—O. M. l. 3, t. 3, a. 11, 1 Va. 651, 652; Poth. L. Mar. n. 68; 1 Em. 428, 429; 2 Bou.-Pat. 400-5; 3 Par. n. 644; Abbott, 275-8; Sm. M. L. 313, 329; 3 Kt. 207, 212; C. Co. 296. [III. 309.]

2428. On the completion of the voyage, and after due compliance with the laws and regulations of the port, the master is obliged to deliver the goods without delay to the consignee or his assignee, on production of the bill of lading and payment of the freight and other charges due in respect of it.—Poth. L. Mar. n. 35, 36; Abbott, 281; Sm. M. L. 314. [III. 309.]

2429. The goods must be delivered in conformity with the terms of the bill of lading, and according to the law or usage observed in the place of delivery.—1 Va. t. Fret, a. 17, 659; Poth. L. Mar. n. 40; C. Co. 306; 3 Par. n. 719, p. 189 & n. 727, p. 201; Sm. M. L. 315; Abbott, 283, *n.* a.; 3 Kt. 216. [III. 309.]

2430. Whenever any vessel has arrived at its destination in any port in Lower Canada, and the master thereof has notified the consignee, either by public advertisements or otherwise, that such cargo has reached the place designated in the bill of lading, such consignee is bound to receive the same within twenty-four hours after notice; and thereafter such cargo, so soon as placed on the wharf, is at the risk and charges of the consignee or owner.—C. S. L. C. c. 60, s. 1. [III. 311.]

2431. The time allowed for the discharge of cargoes consisting of certain kinds of merchandise is regulated by an act intituled: *An act respecting the discharging of the cargoes of vessels.*—C. S. L. C. c. 60. s. 2. [III. 311.]

2432. The owner or master is not liable for loss or damage occasioned by the fault or incapacity of any qualified pilot, acting in charge of the ship within any district where the employment of such pilot

is compulsory by law.—I. S. 17 & 18 V. c. 104, s. 388; Sm. M. L. 319. [III. 311.]

2433. The owner of a sea-going ship is not liable for the loss or damage, occurring without his actual fault or privity:

1. Of anything whatsoever on board any such ship, by reason of fire, or

2. Of any gold, silver, diamonds, watches, jewels or precious stones on board such ship, by reason of any robbery, embezzlement, making away with, or secreting of the same; unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bill of lading, or otherwise declared in writing, to the master or owner of such ship, the true nature or value of such articles.—I. S. 17 & 18 V. c. 104, s. 503; Gaherty & Torrance et al., 13 L. C. R. 401. [III. 311.]

2434. When any damage or loss is caused to anything on board a sea-going ship, without the fault or privity of the owner, he is not answerable in damages to an extent beyond the value of the ship, and the freight due, or to grow due, during the voyage; provided that such value shall not be taken to be less than fifteen pounds sterling per registered ton, and that the owner shall be liable for every such loss and damage arising on distinct occasions, to the same extent as if no other loss or damage had arisen.—I. S. 17 & 18 V. c. 104, s. 504, 506; C. Co. 216; 1 Va. t. Propriétaires, a. 2, 568. [III. 311.]

2435. The freight mentioned in the last preceding article is, for the purposes thereof, deemed to include the value of the carriage of any goods belonging to the owners of the ship, passage-money, and the hire due or to grow due under any contract; except only such hire, in the case of a ship hired for time, as may not begin to be earned until the expiration of six months after the loss or damage.—I. S. 17 & 18 V. c. 104, s. 505. [III. 311.]

2436. The provisions contained in articles 2433 and 2434 do not apply to any master or seaman, being also owner or part owner of the ship to which he belongs, to take away or lessen the liability to which he is subject in his capacity of master or seaman.—I. S. 17 & 18 V. c. 104, s. 516; C. Co. 216. [III. 311.]

CHAPTER SIXTH.

OF THE OBLIGATIONS OF THE LESSEE.

SECTION I.

General provisions.

2437. The principal obligations of the lessee are: 1. To load the ship with the stipulated cargo, and within the time specified by the contract, or, if no time be specified, within a reasonable delay; 2. To pay the freight with primage and average, and demurrage when any is due.—1 Va. t. Fret, a. 3, 642; Poth. L. Mar. n. 56; C. Co. 288; 2 Bou.-Pat.

363 --; Sm. M. L. 321, 322. [III. 313.]

2438. The lessee cannot put on board any prohibited or uncustomed goods, by which the ship may be subjected to detention or forfeiture, or goods of a dangerous nature, without notice to the master or owner. —1 Va. 650; Abbott, 304; Sm. M. L. 321-2; M. S. A. 1854, s. 329. [III. 313.]

2439. If the lessee fail to load the ship fully, as agreed by the charter-party, or if after loading, he withdraw the goods before the departure of the ship or during the voyage, he is liable to pay the whole freight, and to indemnify the master for all expenses and liabilities arising from such withdrawal. —1 Va. t. Fret, a. 3, 6, 8, 642-8; Poth. L. Mar. n. 73, 74, 77-80; C. Co. 288, 291; Abbott, 311, 424, *n.* a.; Mac. 502, 384; 3 Kt. 219. [III. 313.]

2440. If the ship be delayed in her departure, or during the voyage, by the fault of the freighter, he is liable for demurrage and other charges.— —1 Va. t. Fret, a. 9, 649; Poth. L. Mar. n. 75, 76; C. Co. 294. [III. 313.]

2441. If the lessee agree to furnish a return cargo, and fail to do so, and the ship of necessity return unladen, the lessee is obliged to pay the whole freight, subject, in the latter case, to the deduction of such amount as the ship may have earned on the return voyage.—Va., Poth., C. Co., l. c.; 2 Bou.-Pat. 390, 391; Abbott, 312; 3 Kt. 219. [III. 313.]

SECTION II.

Of freight, primage, average and demurrage.

2442. Freight is the recompense payable for the lease of a ship, or for carrying goods upon a lawful voyage to the place of their destination. In the absence of express stipulation it is not due until the carriage of the goods is completely performed, except in the cases specified in this section.—Poth. L. Mar. n. 57, 58; C. Co. 286; 2 Bou.-Pat. 330, 331; Abbott, 307, 308, 323; Mac. 306, 384; Sm. M. L. 323, 324; 3 Kt. 219. [III. 313.]

2443. The amount of freight is regulated by the agreement in the charter-party, or bill of lading, at a gross sum for the whole ship, or a certain part of it, or at a fixed rate per ton, or package, or otherwise. If not regulated by agreement, the rate is estimated upon the value of the service performed, according to the usage of trade. —1 Va. t. Fret, 639; Poth. L. Mar. n. 8; C. Co. 273, 286; Abbott, 311; Sm. M. L. 323, 324. [III. 313.]

2444. The amount of freight is not affected by the longer or shorter duration of the voyage, unless the agreement be to pay a certain sum by the month, or week, or other division of time, in which case the freight begins to run, if not otherwise stipulated, from the commencement of the voyage, and so continues, as well during its course, as during all unavoidable delay not occasioned by the fault of the

master or lessor; subject nevertheless to the exception contained in the next following article.—O. M. t. 3, a. 9, 1 Va. 649; C. Co. 275; 3 Par. 706; Abbott, 313; Sm. M. L. 325. [III. 315.]

2445. If the ship be detained by the order of a sovereign power, freight payable by the time does not continue to run during such detention. The wages of the seamen and the expense of their maintenance are in such case a subject of general average. —1 Va. Fret, a. 16, p. 657; Poth. L. Mar. n. 85; 1 Em. 539, 624; 1 Beawes, 160, 1; Abbott, 380; Sm. M. L. 331; 3 Kt. 237, 8; C. Co. 300, 400. [III. 315.]

2446. The master may discharge, at the place of loading, goods found in his ship, if they have not been declared, or he may recover freight upon them, at the usual rate paid, at the place of loading, for goods of a like nature. —1 Va. t. Fret, a. 7, p. 647; Poth. L. Mar. 9; C. Co. 292; 2 Bou.-Pat. 372, 3; Mac. 341. [III. 315.]

2447. If the ship be obliged to return with her cargo, by reason of a prohibition of trade occurring, during the voyage, with the country to which she is bound, freight is due upon the outward voyage only, although a return cargo has been stipulated.—1 Va. Fret, 656; Poth. L. Mar. n. 69; C. Co. 299; Abbott, 323; 3 Kt. 222. [III. 315.]

2448. If, without any previous fault of the master or lessor, it becomes necessary to repair the ship in the course of the voyage, the freighter is obliged either to suffer the necessary delay or to pay the whole freight. In case the ship cannot be repaired, the master is obliged to engage another; if he be unable to do so, freight is due only in proportion to the part of the voyage which is accomplished.—O. M. l. 3, t. 3, a. 11; 1 Va. 651, 2; Poth. L. Mar. n. 68; C. Co. 296, 7; Abbott, 276-8, 330. [III. 315.]

2449. Freight is due upon the goods which the master has of necessity sold to repair the ship, or to supply it with provisions and other urgent necessaries, and he is obliged to pay for such goods the price which they would have brought at the place of destination.—This rule applies equally although the ship be afterwards lost on the voyage; but in that case the price is that at which the goods were actually sold.—1 Va. t. Fret, a. 14, p. 655; Poth. L. Mar. n. 34, 71, 72; O. W. a. 35, 69; J. Oléron, 22; C. Co. 298; Abbott, 322; Sm. M. L. 323, 4; 3 Kt. 214, 222. [III. 315.]

2450. Freight is payable upon the goods cast overboard for the preservation of the ship and of the remainder of the cargo, and the value of such goods is to be paid to the owner of them by contribution on general average.—1 Va. t. Fret, a. 13, p. 654; Poth. L. Mar. 70; C. Co. 301; Abbott, 322; Sm. M. L. 323. [III. 315.]

2451. Freight is not due upon goods lost by shipwreck, taken by pirates, or captured by a public enemy, or which

without the fault of the freighter have wholly perished by a fortuitous event, otherwise than as mentioned in the last preceding article. If the freight or any portion of it have been paid in advance, the master is bound to return it, unless there is an agreement to the contrary.—1 Va. t. Fret, a. 18, 660, 661; Guidon, a. 2, c. 6; J. Oléron, a. 9, *n.* 9; Poth. L. Mar. n. 63; 3 Par. n. 716; Abbott, 307; Sm. M. L. 323; 3 Kt. 219, 223; C. Co. 303. [III. 317.]

2452. If the goods be recaptured or saved from the shipwreck, freight is due to the place of capture or wreck, and if they be afterwards conveyed by the master to their place of destination, the whole freight is due, subject to salvage.—1 Va. a. 19, 662; Poth. L. Mar. n. 67; C. Co. 303; Abbott, 331, 359; Sm. M. L. 324; 3 Kt. 223. [III. 317.]

2453. The master cannot keep the goods in his ship in default of payment of the freight; but, at the time of unloading, he may prevent them from being carried away, or cause them to be seized. He has a special privilege upon them while they remain in his possession, or the possession of his agent, for the payment of his freight, with primage and accustomed average, as expressed in the bill of lading.—1 Va. t. Fret, a. 23, 24; Poth. L. Mar. n. 89, 90; O. W. a. 57; C. Co. 306; 2 Bou.-Pat. 479-80; Abbott, 282; 3 Kt. 220, 221; Brewster et al. vs. Hooker et al. 1 L. C. J. 90. [III. 317.]

2454. The consignee, or other authorized person who receives the goods, is bound to grant a receipt for them to the master; and the acceptance of goods, under a bill of lading by which delivery is to be made to the consignee or his assigns, he or they paying freight, renders the person so receiving them liable for the freight due upon them, unless the person is the known agent of the shipper.—1 Va. t. Connaissement, a. 5, 636; C. Co. 285; Abbott, 319, 320; 3 Kt. 221, 222. [III. 317.]

2455. Goods which are diminished in value or damaged by reason of intrinsic defect in them, or by a fortuitous event, cannot be abandoned for freight.—But if without any fault of the freighter, casks containing wine, oil, honey, molasses, or other like things, have leaked so much that they are nearly or altogether empty, the casks may be abandoned in satisfaction of the freight.—1 Va. a. 25, 26, p. 669, 672; Poth. L. Mar. n. 59, 60; Cons. d. M. c. 234; Guidon, c. 7, a. 11; C. Co. 310; 2 Bou.-Pat. 492-498; 2 Delv. 293; Abbott, 325-329; Bell, Com. 570; 3 Kt. 224, 225; Mac. 399 --. [III. 317.]

2456. The obligation to pay primage and average, which are mentioned in the bill of lading, is subject to the same rules as the liability for freight; the primage is payable to the master in his own right, unless there is a stipulation to the contrary.—Poth. L. Mar. n. 57; Abbott, 305; 3 Kt. 232, *n.* a. [III. 317.]

2457. Demurrage is the compensation to be paid by the freighter for the detention of the ship beyond the time agreed upon, or allowed by usage, for loading and discharging.—Abbott, 220, 221, 223; Mac. 445; 3 Kt. 303. [III. 317.]

2458. Any person who receives the goods under a bill of lading importing an obligation to pay demurrage, is liable for such demurrage as may become due on the discharge of the goods; subject to the rules declared in article 2454.—Abbott, 220-2; Mac. 446, 447. [III. 319.]

2459. Demurrage under express contract is due for all delays which are not caused by the shipowner or his agents. It does not begin to be computed until the goods are ready to be discharged, after which, if the stipulated time have expired, a further reasonable time must be allowed for their discharge.—Abbott, 224, 225, 227, 231, 232; Mac. 445, 446, 451-3; 3 Kt. 203; Sm. M. L. 302. [III. 319.]

2460. If the time, conditions, and rate of demurrage be not agreed upon, they are regulated by the law and usage of the port where the claim arises.—Abbott, 227. [III. 319.]

TITLE FOURTH.

OF THE CARRIAGE OF PASSENGERS IN MERCHANT VESSELS.

2461. Contracts for the carriage of passengers in merchant vessels are subject to the provisions contained in the title *Of Affreightment*, in so far as they can be made to apply, and also to the rules contained in the title *Of Lease and Hire*, relating to the carriage of passengers. [III. 319.]

2462. The special rules concerning the conveyance of passengers by sea in passenger ships on voyages from the United Kingdom to this province, or on Colonial voyages, or from this province to the United Kingdom in any ship, are contained in the acts of the imperial parliament, intituled respectively: *The Passengers Act*, 1855, and *The Passengers Act Amendment Act*, 1863, and in the lawful orders and regulations made by competent authority under the same.—I. S. 18, 19 V. c. 119; 26, 27 V. c. 51. —Order of H. M. in Council, 7th Jan. 1864. [III. 319.]

2463. Special rules concerning vessels which arrive in the port of Quebec or in the port of Montreal from any port in the United Kingdom or of any other part of Europe with passengers or emigrants there-

from, and rules relating to the rights and duties of the masters of such vessels, and for the protection of such passengers and emigrants are contained in an act intituled: *An act respecting emigrants and quarantine.*—C. S. C. c. 40. [III. 319.]

2464. Passengers while in the vessel are entitled to fitting accommodation and food, according to agreement and to the special laws referred to in the foregoing articles, or, if there be no agreement and such laws do not apply, according to usage and the condition of the parties. [III. 319.]

2465. The owner or master has a lien or privilege upon the baggage and other property of the passengers on board the vessel for the amount of the passage money. — Mac. 294; Wolf and Summers, 2 Camp. 631. [III. 319.]

2466. The passenger is subject to the authority of the master as declared in the title *Of Merchant Shipping.* — C. 2361. [III. 319.]

2467. Damages for personal injuries suffered by passengers are subject to the special rules contained in articles 2434-6. [III. 319.]

TITLE FIFTH.

OF INSURANCE.

CHAPTER FIRST.

GENERAL PROVISIONS.

SECTION I.

Of the nature and form of the contract.

2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes for a valuable consideration, to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.—Poth. Ass. 2; 1 Bell, Com. n. 534, p. 509; 1 Em. 2; 2 Par. 588; 3 Ib. n. 756; 1 Arn. 1, § 1; 3 Kt. 252; 1 Alau. n. 108; 1 Ph. s. 1, p. 1; Marsh. p. 1. [III. 321.]

2469. The consideration or price which the insured obliges himself to pay for the insurance, is called the premium. It does not belong to the insurer until the risk begins, whether he has received it or not.—Poth. Ass. 179; 1 Em. 61; 2 Va. O. 1681, p. 93; 2 Par. 591, p. 467; Marsh. 648; 1 Ph. 79; C. Co. 349. [III. 321.]

2470. Marine insurance is always a commercial contract; other insurances are not by their nature commercial, but they are so when made for a premium by persons carrying

on the business of insurers; subject to the exception contained in the next following article.—Smith vs. Irvine, 1 Rev. 47; 2 Par. n. 588, p. 443-4; 1 Dal. D. Assurance Ter. n. 19, 20, 22; Boud. n. 70, 77, 384; C. Co. 633. [III. 321.]

2471. Mutual insurance is not commercial. It is governed by special statutes, and by the general rules contained in this title, in so far as they are applicable and not inconsistent with such statutes.—C. S. L. C. c. 68; C. 2470. [III. 321.]

2472. All persons capable of contracting may insure objects in which they have an interest and which are subject to risk.—C. 2468; Poth. Ass. 10, 45; 2 Par. 592; Ph. 19, 26, c. 3, s. 1. [III. 321.]

2473. Incorporeal things as well as corporeal, and also human life and health, may be the object of insurance.—Poth. Ass. 26; 2 Par. 589, 590; Marsh. 208; C. 2470. [III. 321.]

2474. A person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it. —1 Arn. 281; 1 Ph. 27. [III. 321.]

2475. The interest insured must exist at the time of the loss unless the policy contains the stipulation of lost or not lost. — The rule is subject to certain exceptions in life insurance. — Arn. 285; 2 Ph. 27. [III. 321.]

2476. Insurance may be made against all losses by inevitable accident, or irresistible force, or by events over which the insured has no control; subject to the general rules relating to illegal and immoral contracts.—2 Par. 591; Marsh. 1; Ph. 157, c. 10; C. 1068; Alau. c. 9, p. 299 --. [III. 321.]

2477. The insurer may effect a re-insurance, and the insured may insure the solvency of the first insurer.—2 Va. O. M. a. 20, p. 65; Guidon, c. 2, 19, 20; 3 Par. n. 767; Ang. Ins. Pr. View, § 24, 25, 83, 84; Pars. M. L. 514; Marsh. 137 --. [III. 323.]

2478. In case of loss the insured must, with reasonable diligence, give notice thereof to the insurer; and he must conform to such special requirements as may be contained in the policy with respect to notice and preliminary proof of his claim, unless they are waived by the insurer.—If it be impossible for the insured to give notice or to make the preliminary proof within the delay specified in the policy, he is entitled to a reasonable extension of time.—Scott vs Phœnix Ass. Co. St. Rep. 152, 355; Dill vs. Quebec Ass. Co. 1 Rev. 113. [III. 323.]

2479. Insurance is divided, with respect to its objects and the nature of the risks, into three principal kinds:

1. Marine insurance;
2. Fire insurance;
3. Life insurance. [III. 323.]

2480. The contract of insurance is usually witnessed by an instrument called a policy of insurance. — The policy either declares the

value of the thing insured and is then called a valued policy, or it contains no declaration of value, and is then called an open policy.—Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal. —Poth. Ass. n. 99 --; Em. c. 1, s. 1; 1 Ph. 4, 5, 305, 320, c. 14, s. 1, 2, p. 2, 3, *n.* b.; I. S. 19 Geo. 2, c. 37; 2 Par. n. 592, 593, 3°, 594, p. 81, n. 593 --, c. 3; 1 Arn. 12, 13, n. 14, 16; C. Co. 332, 339. [III. 323.]

2481. The acceptance of an application for insurance constitutes a valid agreement to insure, unless the insurer is required by law to contract in another form exclusively. — The Montreal Assurance Co. and McGillivray, 9 L. C. R. 488; Poth. Ass. 99; Marsh. 290, *n.*; Pars. M. L. 492, *n.* 1; 1 Ph. 5. [III. 323.]

2482. Policies of insurance may be transferred by indorsement and delivery, or by delivery alone, subject to the conditions contained in them. —But marine policies and fire policies can be transferred only to persons having an insurable interest in the object of the policy.—2 Va. 45; Arn. 211; 1 Ph. 11, 12; 2 Ib. 17, 18; Marsh. 800, 803. [III. 323.]

2483. In the absence of any consent or privity on the part of the insurer, the simple transfer of the thing insured does not transfer the policy.— The insurance is thereby terminated, subject to the provisions contained in article 2576. — C. 2475; Leclaire vs. Crasper, 5 L. C. R. 487; 3 Kt. 261, n. 2. [III. 323.]

2484. The announcements and clauses which are essential or usual in policies of insurance, are declared in articles hereinafter contained relating respectively to the different kinds of insurance. [III. 323.]

SECTION II.

Of representation and concealment.

2485. The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.—2 Par. n. 593, 5°; C. 2486, 2487. [III. 325.]

2486. The insured is not obliged to represent facts known to the insurer, or which from their public character and notoriety he is presumed to know; nor is he obliged to declare facts covered by warranty express or implied, except in answer to inquiries made by the insurer.—C. 2487; 3 Kt. 285, 286; 1 Ph. 88, 89. [III. 325.]

2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.—Poth. Ass. c. 3 s. 3, 194-199; 1 Alau. n. 202, p. 371, 380, 381; 2, Ib., p. 414; Marsh.

452, 453, 479; 3 Kt. 283; 1 Ph. 80, 81, 103; 1 Arn. 544. n. 194; 2 L. C. R. Casey and Goldsmith, 202; 4 Ib. 107; 1 Dal. D. Assurances ter. n. 85; C. Co. 348; 1 Bell, Com. 532 --, n. 558; Boud. c. 1, s. 4, § 1. [III. 325.]

2488. Fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favor of the innocent party.—C. 2487. [III. 325.]

2489. The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment.—C. 2487. [III. 325.]

SECTION III.

Of warranties.

2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured. — They are either express or implied.—3 Kt. 288; 1 Ph. 117, 127, c. 8, 9; 1 Arn. p. 625, § 223, p. 689, c. 4; Scott vs. Quebec Fire Ass. Co. and Scott vs. Phœnix Ass. Co., St. Rep. 147, 354; 1 Bell, Com. 529, 530, *n.* 1. [III. 325.]

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy.—Implied warranties will be designated in the following chapters relating to different kinds of insurance. —Marsh. 353; 3 Kt. 287-290; Arn. c. 3, 625, 629, 630, 689; 1 Ph. 112, 124, 127. [III. 325.]

CHAPTER SECOND.

OF MARINE INSURANCE.

SECTION I

General provisions

2492. The policy of marine insurance contains:—The name of the insured or of his agent; —A description of the object insured, of the voyage, of the commencement and termination of the risk, and of the perils insured against;—The name of the ship and master, except when the insurance is on a ship or ships generally;—The premium;—The amount insured; —The subscription of the insurer with its date.—It also contains such other clauses and announcements as the parties may agree upon.—2 Va. O. M. h. t. a. 3, 31; 1 Em. c. 2, s. 7, p. 52; Poth. Ass. 104; 1 Bell, Com. n. 542, 516; 1 Arn. c. 2, s. 3, p. 19, § 18 --; 1 Alau. n. 209 --, c. 14; Marsh. 313 --; C. Co. 332. [III. 325.]

2493. Insurance may be made on ships, on goods, on freight, on bottomry and respondentia loans, on profits and commissions, on premiums of insurance, and on all other things appreciable in money and exposed to the risks of navigation, with the exception of seamen's wages, upon which insurance cannot be legally made, and subject to the gen-

eral rules relating to unlawful and immoral contracts.—2 Va. O. M. h. t. art. 7; a. 15, 16; Poth. Ass. c. 1, s. 2, a. 1, § 2; 3 Kt. 270-2; 1 Ph. 64-74, c. 5; Arn. c. 11, 249; Marsh. b. 1, c. 3, 51, 93 --; C. Co. 334. [III. 327.]

2494. Insurance may be made for any kind of voyage or transport by sea, river or canal navigation and either for the whole voyage or for a limited time. — C. Co. 335. [III. 327.]

2495. The risk of loss or damage of the thing insured by perils of the sea is essential to the contract of marine insurance.—The risks usually specified in the policy are tempest and shipwreck, stranding, collision, unavoidable change of the ship's course, or of her voyage, or of the ship itself, fire, jettison, plunder, piracy, capture, reprisal and other casualties of war, detention by order of a sovereign power, barratry of the master and mariners, and generally all other perils and chances of navigation by which loss or damage may arise.—The parties may limit or extend the risks by special agreement. —2 Va. l. c. a. 26, p. 74; Poth. Ass. l. c. § 2, n. 49 --; 1 Bell, Com. 518; 1 Arn. 17, 30; 3 Par. n. 770 --; C. Co. 350. [III. 327.]

2496. If the time of the commencement and termination of the risk be not specified in the policy, it is regulated according to article 2598. [III. 327.]

2497. Marine policies in cases of doubtful meaning are construed by the established and known usage of the trade to which the policy relates; such usage is held to be a part of the policy when it is not otherwise expressly provided. —1 Arn. 71. [III. 327.]

2498. An insurance made after the loss or the arrival of the object of it, is null, if, at the time of insuring, the insured had a knowledge of the loss, or the insurer of the arrival.—Such knowledge is presumed where information might have been received in the usual course and at the usual rate of transmission. — 3 Va. O. M. h. t. a. 38, 93; Poth. Ass. 46, 47; 1 Arn. 585; C. Co. 365; 2 Duer, 433; O. M. a. 39; C. Co. 366. [III. 327.]

SECTION II.

Of the obligations of the insured.

2499. The principal obligations of the insured relate:—To the premium;—To representation, and concealment;—To warranties and conditions;—To abandonment, which is treated in the fifth section. [III. 329.]

§ 1. *Of the premium.*

2500. The insured is obliged to pay the amount or rate of premium agreed upon, according to the terms of the contract.—If the time of payment be not specified, it is payable without delay. — 2 Va. h. t. a. 6, p. 47; Poth. Ass. 81; 3 Par. 789; 1 Ph. 76. [III. 329.]

2501. In the following cases the premium is not due, and if

it have been paid it may be recovered back, the contract being void:

1. When the risk insured against does not occur, either by reason of the entire breaking up of the voyage before the departure of the ship, or for other causes, even those arising without fraud from the act of the insured;

2. When there is a want of insurable interest, or any other cause of nullity, without fraud on the part of the insured.—The insurer in these cases is entitled to one half per cent on the sum insured, for his indemnification, unless the policy is illegal, or rendered null by fraud, misrepresentation or concealment on his part.—If the policy be illegal there is no right of action for the premium, and none to recover it back if it have been paid.—2 Va. h. t. a. 37, 38, p. 93, a. 41, p. 96; Poth. Ass. 179, 180, 182; 1 Em. 12; 2 Ib. c. 16, s. 1, p. 187; 2 Arn. c. 11, 1269. § 424 --; 1 Ph. 503, 514; 2 Ib. 353; Marsh. 464, 662, 663; 1 Alau. n. 179; Par. n. 872; 4 Bou.-Pat. 1, 3, 114; 1 Arn. 349; C. Co. 349. [III. 329.]

2502. The preceding article applies when the risk occurs for part only of the value insured, for the non-payment or return of a proportional part of the premium, according to circumstances and the discretion of the court.—Poth. Ass. 183; C. 2501. [III. 329.]

§ 2. *Of representation and concealment.*

2503. The rules concerning representation, and the effect of misrepresentation or concealment are declared in chapter one, section two.—C. 2485-2489. [III. 329.]

§ 3. *Of warranties.*

2504. The general rules relating to warranties are contained in chapter one, section three.—C. 2490, 2491. [III. 329.]

2505. It is an implied warranty in every contract of marine insurance that the ship shall be sea-worthy at the time of sailing. She is sea-worthy when she is in a fit state, as to repairs, equipments, crew, and in all other respects, to undertake the voyage.—3 Par. n. 866, p. 438 --; 1 Arn. 689; 3 Kt. 287, 288; 1 Ph. 112, 113; 1 Bell, Com. 530 --. [III. 329.]

2506. In insurance for a ship-owner it is an implied warranty that the ship shall be properly documented and conducted according to the laws and treaties of the country to which she belongs, and to the law of nations.—3 Par. n. 866, p. 437; Marsh. 177; 1 Ph. 113, 119; 1 Arn. s. 4, a. 1, 727 --; C. Co. 352-3; 1 Bell, Com. 530 --. [III. 331.]

SECTION III.

Of the obligations of the insurer

2507. The principal obligation of the insurer is to pay to the insured all losses suffered by him by reason of any of the risks insured against, according to the terms of the contract.—His liability is subject

to the rules contained in the foregoing section and to the rules and conditions hereinafter declared.—Poth. Ass. 115, 117, 118; 3 Par. c. 3, s. 4, p. 365; C. Co. 350. [III. 331.]

2508. The insurer is not liable for losses suffered after a deviation or change of the risk made without his consent, by changing, contrary to the established usage, the ship's course or the voyage, or the ship itself, by the order of the insured, unless the deviation or change is of necessity, or for the purpose of saving human life.—The insurer is nevertheless entitled to the premium if the risk has commenced. — 2 Va. O. M. h. t. a. 27, p. 77, a. 36, p. 87; Poth. Ass. 51, 68 --; 1 Em. 363, 418, 419, c. 2, s. 2, 15, 16, 2 Ib. c. 13, s. 16, p. 98; 1 Arn. c. 15, p. 393 --; 2 Ib. c. 1, s. 3; 3 Kt. 314, --; 1 Ph. c. 12, p. 179, c. 13, p. 224; 3 Par. n. 66, p. 867; C. Co. 351, 352, 364. [III. 331.]

2509. The insurer is not liable for loss or damage arising from intrinsic defect in the thing, or caused by the culpable act or gross negligence of the insured.—2 Va. h. t. a. 29, p. 80; Poth. Ass. 66; 3 Kt. 306, 397, *n.* e.; C. Co. 352. [III. 331.]

2510. The insurer is not liable for loss by barratry of the master or mariners unless there is an agreement to the contrary.—2 Va. h. t. a. 28, p. 79; Marsh. 338; Arn. 17, 31; C. Co. 353. [III. 331.]

2511. Barratry is any act of wilful misconduct by the master or mariners whereby loss is caused to the owners or freighters. — 2 Arn. 843, 845, 864; 1 Ph. c. 13, s. 2, p. 230, 1; 3 Kt. 304, 305; Marsh. 519, 521; Toub. 658. [III. 331.]

2512. The insurer is not liable for the ordinary charges known as petty averages, such as pilotage, towage, tonnage, anchorage, clearance, or duties imposed upon the ship or cargo. —2 Va. h. t. a. 30, p. 81; Poth. Ass. 67; 3 Par. n. 884; 2 Arn. 1006; C. Co. 354. [III. 331.]

2513. The limitation of the insurer's liability, for particular average under a certain amount and for the loss or damage of certain articles enumerated in the common memorandum of warranty to be free from average, is regulated by the terms of such memorandum contained in the policy. If there be no memorandum of warranty, the general rules declared in this title apply.—Stev. 219 --; 2 Arn. c. 3, p. 872-4; 1 Ph. c. 18, p. 483; 4 Bou.-Pat. 87; 4 Em. c. 12, a. 9; Poth. Ass. 166; C. Co. 408-9. [III. 331.]

2514. A contract of insurance made fraudulently on the part of the insured for a sum exceeding the value of the object of it, may be annulled by the insurer who in such case is entitled to one half per cent upon the amount insured.—Val. h. t. a. 22, 71; C. Co. 357. [III. 333.]

2515. If in the case specified in the last preceding article there be no fraud, the contract is valid to the amount of the value of the object insured.—The insurer is not entitled to the full premium upon

the amount insured in excess of the value, but to one half per cent only.—2 Va. h. t. art. 23, 72; C. Co. 358. [III. 333.]

2516. If there be several contracts of insurance effected without fraud upon the same object, and against the same risks, and the first contract insures the full value of the object, it alone can be enforced. —The subsequent insurers are free from liability and are bound to return the premium, reserving a half per cent. — Subject nevertheless to such special agreements and conditions as may be contained in the policies of insurance. — 2 Va. h. t. a. 24, 73; 2 Alau. 52 --; 2 Par. 589; 3 Ib. 767; 1 Arn. c. 12, s. 5, p. 345-351; Marsh. 139; C. Co. 359. [III. 333.]

2517. When in the case specified in the last preceding article the total value of the object is not insured by the first contract, the subsequent insurers are liable for the surplus according to the date of their respective contracts; subject to the same restriction.—Va. h. t. a. 25. [III. 333.]

2518. If the subsequent insurance be fraudulent on the part of the insured, he is obliged to pay the whole premium on such insurance but is not entitled to recover anything upon it.—1 Em. (Bou.-Pat.) c. 9, s. 2, p. 270, 272, 273; 4 Bou.-Pat. 124, 125; 1 Arn. 348; C. Co. 357. [III. 333.]

2519. When there is a partial loss of an object insured by several insurances to an amount not exceeding its full value, the insurers are liable for it rateably in proportion to the sums for which they have respectively insured.—C. Co. 360, 401; 2 Va. 73, 74. [III. 333.]

2520. When the insurance is made separately upon goods to be laden in different ships, if all the goods be placed in one of the ships or in any number of them less than the whole, the insurer is liable only for the sum insured on the goods which under the contract were to be placed in such ship or ships, although all the ships specified in the contract be lost. He is entitled nevertheless to one half per cent of premium upon the remainder of the total amount insured.—2 Va. h. t. a. 22, p. 84; 1 Alau. 66, 67; C. Co. 361; Em. c. 6, s. 5, p. 174-178; 1 Arn. c. 9, s. 3. [III. 333.]

SECTION IV.

Of losses.

2521. Loss for which the insurer is liable is either total or partial.—Marsh. 486, & c. 13, s. 1, p. 563, 564. [III. 333.]

2522. Total loss may be either absolute or constructive. —It is absolute when the thing insured is wholly destroyed or lost.—It is constructive when, by reason of any event insured against, the thing though not wholly destroyed or lost becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing. — Before the insured can claim for a constructive total loss he must make an abandonment as declared in the following section.

—Marsh. 597; Arn. 1007. [III. 333.]

2523. All losses not included within the meaning of the last preceding article are partial losses. [III. 335.]

2524. When a loss by collision occurs by a fortuitous event without either party being in fault, it falls upon the injured ship without recourse against the other, and is a loss by the perils of the sea for which the insurer is liable under the general terms of the policy.—C. 2526. [III. 335.]

2525. When the collision is caused by the fault of the master or mariners of one of the ships, the party in fault is liable to the other, and if the insured ship be the one injured by the fault of the master or mariners of the other, the insurer is liable under the general clause, but if the injury be caused by the fault of the master or mariners of the insured ship, the insurer is not liable. If the fault amount to barratry, it is subject in so far as the insurer is concerned, to the provision contained in article 2510.—C. 2526. [III. 335.]

2526. If the cause of the collision be unknown or it be impossible to determine by whose fault it was caused, the damages are borne in equal portions by both ships; the insurer is liable in such case under the general clause.—ff. L. 29, § 2, 3, 4 ad leg. aquil.; 1 Em. c. 12, s. 14, p. 409, 416; 2 Va. Ass. a. 26, Avaries, a. 10, 11, p. 177, 183; Poth. Ass. n. 50; Marsh. 494; 2 Arn. 828-830; Cleirac, U. M. 68; M. S. A. 1854, s. 295, 300; 3 Kt. 230--; 1 Ph. 636; 2 Ib. 177, 179; 1 Em. (Bou.-Pat.) 418; 4 Bou.-Pat. 7; C. Co. 407. [III. 335.]

2527. Extraordinary expenses necessarily incurred for the sole benefit of some particular interest, as for the ship alone or for the cargo alone, and damages sustained by the ship alone or the cargo alone, and not voluntarily suffered for the common safety, are particular average losses for which the insurer is liable to the insured under the general terms of the policy, when these losses are caused by the perils of the sea.—2 Va. Avaries, a. 3-5, p. 160, 164; 4 Bou.-Pat. 481; Arn. 970; Ben. P. I. 165, 166, 425; C. Co. 403, 404. [III. 335.]

2528. Loss by salvage is a loss by the perils of the sea for which the insurer is liable under the general terms of the policy.—Special rules relating to salvage are contained in the Merchant Shipping Act, 1854. —2 Va. 164; 2 Em. c. 17, s. 7; Arn. 867; Marsh. 552, 3; C. 2387. [III. 335.]

2529. The rules concerning loss by average contribution are contained in the sixth section of this chapter. [III. 335.]

2530. When in the course of the voyage the ship becomes disabled from completing it, the master is bound to procure another vessel for conveying the cargo to the place of destination, if it can be done with advantage to the parties in-

terested; and in such case the liability of the insurer continues after the cargo is transhipped for that purpose. — C. 2427; 3 Kt. 321, *n.* b.; Marsh. 164, 5, *n.* b. 626, 7; C. Co. 390-2; Em. c. 12 s. 16. [III. 335.]

2531. The insurer is also liable in the case provided in the last preceding article for damages, expenses of discharging, storage, reshipment, supplies, freight and all other costs not exceeding the amount insured.—C. Co. 393; C. 2530. [III. 337.]

2532. If in the case provided in article 2530, the master be unable to procure another vessel within a reasonable time for conveying the cargo to its destination, the insured may make an abandonment of it.—Co. 394; C. 2530. [III. 337.]

2533. In insurance by an open policy the value of the ship is held to be that which she bears at the port where the voyage begins, including whatever adds to her permanent value or is necessary to prepare her for the voyage, and also the costs of insurance.—1 Bell, 527; Marsh. 633. [III. 337.]

2534. The value of the goods insured by open policy is established by the invoice, or if that cannot be done is estimated according to their market price at the time of landing; all charges and expenses incurred up to that time, together with the premium of insurance, are included.—2 Va. a. 64, p. 146; 1 Em. 261-3; 3 Kt. 335, 6; Marsh. 629, 631, 2; Arn. 381, 382; Guidon, c. 2, a. 9, c. 15, a. 3, 13, 15; C. Co. 339. [III. 337.]

2535. The amount for which the insurer is liable on a partial loss is ascertained by comparing the gross produce of the damaged sales with the gross produce of the sound sales, and applying the percentage of difference to the value of the goods as specified in the policy, or established in the manner provided by the last preceding article. — Arn. 985; 1 Ph. 375-7; Johnston vs. Shedden, 2 East, 581. [III. 337.]

2536. The insured is bound when he makes claim for any loss, to declare, if thereunto required, all other insurances effected by him on the thing insured and also the loans taken by him on bottomry and respondentia.—He cannot claim payment for the loss until such declaration is made, when so required, and if the declaration be false and fraudulent he loses his right to recover.—Va. O. M. a. 53, 54, p. 135, 6; Marsh. 145, 702; C. Co. 379, 380; Arn. 353; I. S. 19 Geo. 2, c. 37, s. 6. [III. 337.]

2537. The insured is bound to do in good faith all in his power between the time of loss and the abandonment to save the effects insured. His acts and those of his agents done for that purpose are for the benefit of the insurer and at his expense and risk.—2 Va. 45, p. 98; Marsh. 626, 7; C. Co. 381. [III. 337.]

SECTION V.

Of abandonment.

2538. The insured may make an abandonment to the insurer of the thing insured in all cases of its constructive loss and may thereupon recover as for a total loss. Without abandonment he is entitled in such cases to recover as for a partial loss only.—2 Va. h. t. a. 46, p. 99; Marsh. 564, c. 13, p. 567; C. Co. 369, 371. [III. 337.]

2539. An abandonment cannot be partial or conditional. It extends however only to the property actually at risk at the time of the loss.—2 Va. a. 47, p. 108 --; 2 Em. 249, c. 17, s. 8; Marsh. 611, 612; Arn. 1160, 1161; 4 Bou.-Pat. 289; C. Co. 372. [III. 339.]

2540. If different things or classes of things be insured by the same policy and separately valued, the right to abandon may exist in respect to a part separately valued, as well as in respect to all.—C. 2539. [III. 339.]

2541. The abandonment must be made within a reasonable time after the insured has received intelligence of the loss. —If from the uncertainty of the intelligence or the nature of the loss further inquiry and investigation be required to enable the insured to determine whether he will abandon or not, reasonable delay for that purpose is allowed according to circumstances.—Va. a. 48, 49; Marsh. 606; Arn. 1169; C. Co. 373. [III. 339.]

2542. If the insured fail to abandon within a reasonable time, as provided in the last preceding article, he is held to have waived the right to do so and can only recover as for a partial loss.—C. 2541. [III. 339.]

2543. The abandonment is made by a notice given by the insured to the insurer of the loss, and that he abandons to the latter all his interest in the thing insured.—Va. a. 24; 2 Em. 190; Poth. Ass. 126; Marsh. 610; Arn. 1162, 1163; C. Co. 374. [III. 339.]

2544. The notice of abandonment must be explicit and must contain a statement of the grounds of abandonment. These grounds must exist and be sufficient at the time of the notice.—Arn. 1163-8; C. 2543. [III. 339.]

2545. Abandonment on the ground of the ship being disabled by stranding cannot be made if she can be raised and put in a condition to continue her voyage to the place of destination.—In such case the insured has his recourse against the insurer for the expense and loss occasioned by the stranding.—Em. c. 12, s. 13, p. 404 --; 1 Ph. 393; 2 Ib. 285; C. Co. 389. [III. 339.]

2546. If a ship has not been heard of within a reasonable time after sailing, or after the reception of the last intelligence of her, she is presumed to have foundered at sea, and the insured may make an abandonment and recover for a constructive total loss.—The time necessary for raising such presumption is determined by the court according to the cir-

cumstances of the case.—2 Va. a. 58, 59, 141; Marsh. 189, 192; 2 Arn. 817, 818; C. Co. 375, 377. [III. 339.]

2547. Abandonment made and accepted is equivalent to transfer, and the thing abandoned with the rights pertaining to it becomes from the time of abandonment the property of the insurer.—The acceptance may be either express or implied.—2 Va. 143 --; 2 Em. 230, (Bou.-Pat.) 233-4; Guidon, c. 7, a. 1; 3 Kt. 324, 325, n. b.; Marsh. 612-3; 2 Ph. 321, c. 17, s. 14; Levi, 167, n. 542; C. Co. 385. [III. 339.]

2548. [On an accepted abandonment of the ship, the freight earned after the loss belongs to the insurer of the ship; that earned previously to the loss belongs to the ship-owner or to the insurer on freight to whom it is abandoned.]—2 Va. Ass. a. 15, p. 58, 115-6; Em. c. 17, s. 9, p. 251 --, (Bou.-Pat.) 259; 3 Kt. 332-3; 2 Ph. c. 17, c. 17, p. 473 --; Arn. 1153, 4, 5-8; C. Co. 386. [III. 341.]

2549. Abandonment made upon sufficient ground and accepted, is binding on both parties. It cannot be defeated by any subsequent event, or revoked otherwise than by mutual consent.—2 Em. c. 17, § 6, p. 331; Poth. Ass. 138; Marsh. 625; Levi. 166, n. 557-8-9; Arn. 1069; 2 Va. 143-4; C. Co. 385. [III. 341.]

2550. If the insurer refuse to accept a valid abandonment he is liable as for an absolute total loss, deducting from the amount any proceeds of the thing abandoned which have been applied to the benefit of the insured. — 2 Marsh. 609. [III. 341.]

SECTION VI.

Of loss by average contributions.

2551. In the absence of special agreement between the parties, average contributions are regulated by the following articles of this section, and, when these do not apply, by the usage of trade.—The insurer is bound to reimburse the insured the amount of his contribution not exceeding the sum insured.—2 Arn 967; C. Co. 398. [III. 341.]

2552. Contribution by the ship and freight and by the goods whether saved or lost, rateably and according to their respective values, is made for damages voluntarily sustained and extraordinary expenses incurred, for the common safety of the ship and cargo.—These are called general or gross average losses, and are as follows:

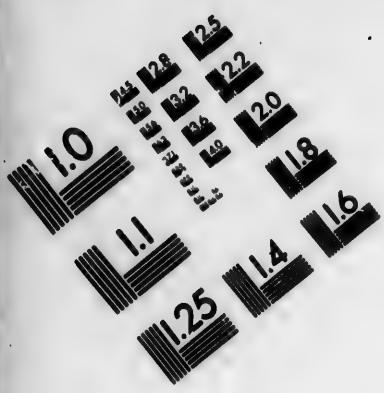
1. Money or other things given as a compensation to pirates to ransom the ship and cargo, or as salvage to recaptors;

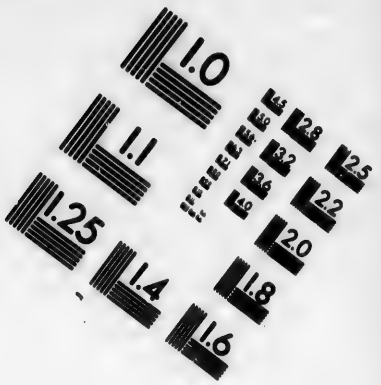
2. Loss by jettison;

3. Masts, cables, anchors or other furniture of the ship, cut away, destroyed or abandoned;

4. Damages caused by jettison to the goods which remain in the ship or to the ship itself;

5. The wages and maintenance of seamen, during the detention of the ship in the course of her voyage, by a sovereign





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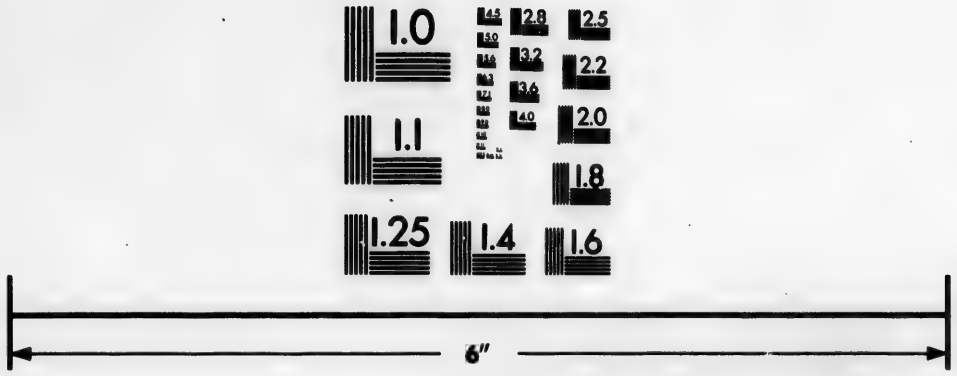

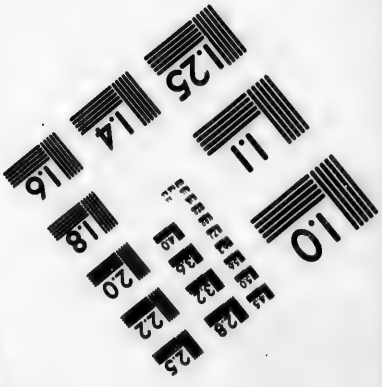

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power, and during the necessary repairs of injuries of a nature to give rise to average contribution;

6. The expense of unlading, to lighten the ship and enable her to enter a port of refuge or river, when she is compelled to do so by storm or by pursuit of an enemy;

7. Loss and expenses arising from the voluntary stranding of the ship for the purpose of escaping total loss or capture.—And in general all damages voluntarily suffered and extraordinary expenses incurred for the common safety of the ship and cargo, from the time of loading and departure of the ship to the time of her arrival and discharge at the port of destination.—ff. L. 14, t, 2, L. 1-5; 2 Va. h. t. a. 2, 6, 7, p. 159, 165, 168; 1 Em. c. 12, s. 13, p. 404--, s. 41, p. 598--; Cons. de M. c. 51, 192, 193, 150; 2 Par. Col. L. M. 166; Cas. 45, n. 60--; 3 Par. c. 4, s. 1, n. 731-741; 2 Marsh. 538-548; Arn. c. 4, s. 2, 3, p. 894, 933-5; 3 Kt. 233-239; C. Co. 400, 401, 422; Abbott, c. 346, 7; C. 2402, 2445. [III. 341.]

2553. Jettison gives rise to contribution only when it is made in imminent peril and is necessary for the preservation of the ship and cargo.—It may be of the cargo, or of the provisions, tackle or furniture of the ship.—ff. L. 14, t. 2, L. 1, L. 2, § 2, de leg. Rhod. de jac.; 2 Va. h. t. a. 1, 2, p. 188, 189; 1 Em. 605, c. 12, s. 40; 2 Arn. 900-4; 1 Ph. 331-2; 2 Ib. 245; Marsh. 540; 3 Kt. 233-4, & *n.* a.; C. Co. 410. [III. 343.]

2554. Jettison must be first made of things the least necessary, the most weighty, and of the least value.—2 Va. a. 3, 189; 3 Kt. 333; C. Co. 411. [III. 343.]

2555. The ship's warlike stores and provisions, and the clothes of the crew, do not contribute, but the value of those lost by jettison is paid by contribution upon other effects generally.—The baggage of passengers does not contribute. If lost it is paid by contribution in which it shares.—2 Va. O. M. h. t. a. 11, p. 199, 201; 1 Magens, 63, s. 55, 56; 1 Em. 624-5-6; Arn. 936; 1 Ph. 364; 3 Kt. 241-2; 4 Bou.-Pat. 561-2; C. Co. 419. [III. 343.]

2556. Goods for which there is no bill of lading or acknowledgment by the master, or which are put on board contrary to the charter-party, are not paid for by contribution if lost by jettison. They contribute if saved.—2 Va. O. M. h. t. a. 11, p. 202; 2 Arn. 904; C. Co. 420. [III. 343.]

2557. Goods carried on deck, which are lost or damaged by jettison, are not paid for by contribution, unless they were so carried in conformity with an established usage and course of trade.—They contribute if saved.—2 Va. h. t. a. 13, p. 203; Em. c. 12, s. 40, 623 Arn. 904; Ben. P. I. 293; 1 Ph. 364; Abbott, 350; C. 2425; C. Co. 421. [III. 343.]

2558. In cases of average contribution the ship and freight are estimated at their value at the port of discharge.—The goods lost as well as

those saved are estimated in like manner, deducting freight, duties and other charges.—ff. L. 2, § 4, de leg. Rhod. de jac.; 2 Va. h. t. a. 6, 7, p. 194-7; Poth. Avaries, 130; 1 Em. 636-7; Marsh. 550-1; Arn. s. 6, 7, p. 946, 948, 950, 951; 3 Kt. 242; C. 2449; C. Co. 402, 415, 417. [III. 343.]

2559. Notwithstanding the rule of valuation contained in the last preceding article, the amount which the insurer is liable to reimburse to the insured for his contribution is regulated by the value which the ship or goods bear according to articles 2533 and 2534, or by the sum specified in the valued policy and not by their contribution value.—2 Va. O. M. 115; 2 Em. (Bou.-Pat.) 2, 8; Arn. 967-8; 2 Ph. 253-4; Ben. P. I. 328; Magens, 245, case 14; Levi, 460. [III. 343.]

2560. No contribution is made for particular average losses. They are borne by the owner of the thing which has suffered the damage or occasioned the expense; saving his recourse against the insurer as declared in article 2527. [III. 343.]

2561. If the ship be not saved by the jettison, no contribution takes place, and the goods saved are not held to contribute for those lost or damaged thereby. — ff. L. 4, § 1, de leg. Rhod. de jac.; 2 Va. O. M. a. 15, h. t. 205; Poth. L. Mar. n. 113, 114; 1 Em. c. 12, s. 41, p. 601; Marsh. 541; 3 Kt. 235; C. Co. 423; Arn. 943 --. [III. 343.]

2562. If the ship be saved by the jettison and continue her voyage, but be afterwards lost, the goods saved are subject to contribution at their actual value, deducting the costs of salvage.—2 Va. O. M. h. t. a. 16; C. Co. 424. [III. 345.]

2563. The goods jettisoned do not in any case contribute to the payment of losses happening afterwards to the goods saved.—The cargo does not contribute to the payment of the ship when lost or rendered unfit for navigation.—2 Va. O. M. h. t. a. 17; C. Co. 425. [III. 345.]

2564. In case of the loss of goods put into lighters to enable the ship to enter into a port or river, the ship and her whole cargo are subject to contribution; but if the ship be lost with the goods remaining on board, the goods in the lighters are not subject to contribution, although they arrive safely in port.—2 Va. O. M. h. t. a. 19, 20, p. 209, 210; C. Co. 427; 2 Marsh. 541. [III. 345.]

2565. It is the duty of the master on his arrival at the first port to make his declaration and protests in the customary form, and also together with some of his crew to make oath that the loss or expense sustained was for the safety of the ship and crew. The neglect to do so does not however affect the rights of the parties interested.—2 Va. h. t. a. 5, 6, p. 190, 191; Marsh. 550; Arn. 900; Stev. 29; C. Co. 411, 412. [III. 345.]

2566. The owners and mas-

ter have a privilege and right of retention upon the goods on board the ship or their price for the amount of contribution for which these are liable.—2 Va. O. M. h. t. a. 21, p. 211; Arn. 965; Marsh. 550; C. Co. 428. [III. 345.]

2567. If after the contribution the goods jettisoned be recovered by the owner, he is bound to repay to the master and other interested parties, the amount of the contribution received by him, deducting therefrom the amount of damage suffered by the goods and the costs of salvage.—ff. L. 2, § 7, 8, de leg. Rhod. de jac.; 2 Va. O. M. h. t. a. 22, p. 211; Dom. l. 2, t. 9, s. 2, n. 17; 1 Em. 640; Arn. 907; C. Co. 429. [III. 345.]

CHAPTER THIRD.

OF FIRE INSURANCE.

2568. Insurance against loss by fire is regulated by the provisions contained in the first chapter of this title, and is subject also to the rules contained in the second chapter, when these can be made to apply and are not inconsistent with the articles contained in this chapter. [III. 345.]

2569. A fire policy contains the name of the party in whose favor it is made;—A description or sufficient designation of the object of the insurance and of the nature of the interest of the insured;—A declaration of the amount covered by the insurance, of the amount or rate of the premium, and of the nature, commencement and duration of the risk;—The subscription of the insurer with its date;—Such other announcements and conditions as the parties may lawfully agree upon.—Boud. n.202-204; Quen. c. 7, § 2, n. 163-191; 2 Alau. § 401, p. 298; 1 Bell, Com. n. 561, p. 540 --; Scott vs. Phœnix Ass. Co., St. Rep. 152, 355. [III. 345.]

2570. Representations not contained in the policy or made a part of it, are not admitted to control its construction or effect. 2 Ph. 96. [III. 347.]

2571. The interest of an insurer against loss by fire may be that of an owner, or of a creditor, or any other interest appreciable in money in the thing insured; but the nature of the interest must be specified.—Marsh. 789; Boud. n. 28 --; 1 Bell, Com. 540. [III. 347.]

2572. It is an implied warranty on the part of the insured that his description of the object of the insurance, shall be such as to shew truly under what class of risks it falls according to the proposals and conditions of the policy.—1 Bell, Com. 541; Ellis, 48; Quen. n. 174-176; Boud. n. 202, p. 241, n. 104, 111, 112. [III. 347.]

2573. An insurance upon effects indeterminately as being in a certain place is not limited to the particular effects which are there at the time of insuring, but attaches to all those falling within the description contained in the policy which are in the place at the time of the loss; unless a different inten-

tion is indicated in the policy. 2 Par. n. 594, p. 489; Ang. § 101, 2; Quen. n. 78; B. A. Ins. Co. & Joseph, 9 L. C. R. 448; Boud. n. 122. [III 347.]

2574. Any alteration in the use or condition of the thing insured from those to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured and which increases the risk, is a cause of nullity of the policy.—If the alteration do not increase the risk, the policy is not affected by it.—3 Kt. 374; 2 Ph. c. 7, s. 2, § 2, p. 96 --; 2 Par. n. 595; Boud. n. 119, p. 149; 3 Par. n. 883. [III. 347.]

2575. The sum insured does not constitute any proof of the value of the object of the insurance; such value must be established in the manner required by the conditions of the policy and the general rules of proof, unless there is a special valuation in the policy. 2 Alau. 304; Ang. Ins. § 11; 1 Bell, Com. 542, 3. [III. 347.]

2576. The insurance is rendered void by the transfer of interest in the object of it from the insured to a third person, unless such transfer is with the consent or privity of the insurer.—The foregoing rule does not apply in the case of rights acquired by succession or in that specified in the next following article.—It is subject to the special provisions contained in *The Insolvent Act of* 1864.—The insured has in all cases a right to assign the policy with the thing insured, subject to the conditions therein contained.—C. 2482, 3; Marsh. 803; Ang. § 11, 193 --; 1 Arn. 211; Lecl. vs. Crasp. 5 L. C. R. 487; Ellis, 76, 77. [III. 347.]

2577. A transfer of interest by one to another of several partners or owners of undivided property who are jointly insured, does not avoid the policy. —[III. 349.]

2578. The insurer is liable for losses caused by the insured otherwise than by fraud or gross negligence. — Ang. 122 --; Boud. n. 294, p. 340 —; 3 Kt. 374, *n.* c. [III. 349.]

2579. The insurer is also liable for losses caused by the faults of the servants of the insured committed without his knowledge or consent. — C. 2578. [III. 349.]

2580. The insurer is liable for all losses which are the immediate consequence of fire or burning from whatever cause it may arise, including damage to the things insured suffered in their removal or by the means used for extinguishing the fire; subject to the special exceptions contained in the policy. —Ang. § 115; 2 Par. n. 595, p. 493; Qu. n. 66, p. 56; C. 2582; B. A. Ins. Co. & Joseph, 9 L. C. R. 448. [III. 349.]

2581. The insurer is not liable for losses caused merely by excessive heat in a furnace, stove or other usual means of communicating warmth when there is no actual burning or ignition of the thing insured. —Poth. Ass. c. 1; 2 Par. 494, 495; Ellis, 77; Ang. 111, 112, 115 --; 1 Bell, Com. 540, 541. [III. 349.]

2582. In case of loss by fire the insurer is liable for the whole amount of the loss not exceeding the sum insured, without deduction or average. —Peddie vs. Quebec Fire Ass. Co., St. Rep. 178; 1 Ph. 375; 1 Bell, Com. 543. [III. 349.]

2583. When by the terms of the policy a delay is given for the payment of the renewed premium, the insurance continues, and if a loss occur within the delay, the insurer is liable, deducting the amount of the premium due. — Ellis 119 --; Ang. § 51; Marsh. 799, 800; 2 Par. n. 596; 1 Bell, Com. 540, 1, § 3; Ellis, 249 --, Want. vs. Blunt; 12 East, 183. [III. 349.]

2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.—The Quebec Fire Ass. Co. vs. Molson et al. 1 L. C. R. 223 --; Ellis, 112, n. 1; Marsh. 796; 2 Par. n. 595, p. 498-500. [III. 349.]

CHAPTER FOURTH.

OF LIFE INSURANCE.

2585. Life insurance is regulated by the provisions contained in the first chapter of this title, and is subject also to the rules contained in the second chapter when these can be made to apply and are not inconsistent with the articles contained in this chapter. — Articles 2570 and 2583 apply to contracts of life insurance. [III. 349.]

2586. Life insurance is subject also to the rules contained in articles 1902, 1903, 1904, 1905, 1906, relating to the persons upon whose life it may be effected. [III. 349.]

2587. A life policy contains: — The name or sufficient designation of the party in whose favor it is made, and of the person whose life is insured;— A declaration of the amount of the insurance, of the amount or rate of premium, and of the commencement and duration of the risk;—The subscription of the insurer with its date;— Such other announcements and conditions as the parties may lawfully agree upon.—2 Alau. 489; Ang. § 284. [III. 351.]

2588. The declaration in the policy of the age and condition of health of the person, upon whose life the insurance is made, constitutes a warranty upon the correctness of which the contract depends.—Nevertheless in the absence of fraud the warranty that the person is in good health is to be construed liberally and not as meaning that he is free from all infirmity or disorder. — Marsh. 772-3; Ellis, c. 2, p. 205 --, & *n.* [III. 351.]

2589. In life insurance the sum insured may be made payable upon the death of the person upon whose life it is effected, or upon his surviving a specified period, or periodically so long as he shall live, or otherwise contingent upon the continuance or determination of life.—Ang. § 274, 275; Ellis, 187. [III. 351.]

2590. The insured must have an insurable interest in

the life upon which the insurance is effected. — He has an insurable interest in the life :

1. Of himself;

2. Of any person upon whom he depends wholly or in part for support or education;

3. Of any person under legal obligation to him for the payment of money, or respecting property or services which death or illness might defeat or prevent the performance of;

4. Of any person upon whose life any estate or interest vested in the insured depends. — 1 Bell, Com. 544; Ang. Ins. § 297-300 --; Dowd. Ins. 21; I. S. 14 Geo. 3, c. 48, s. 1; Ellis, c. 3, p. 232--; 2 Alau. n. 551-556; Quen. 50, 51, 53. [III. 351.]

2591. A policy of insurance on life or health may pass by transfer, will, or succession, to any person, whether he has an insurable interest or not in the life of the person insured. —1 Bell, Com. 545; Ellis, c. 5, p. 263, 264, n. 1. [III. 351.]

2592. The measure of the interest insured is the sum fixed in the policy, except in cases of insurance by creditors or in other like cases in which the interest is susceptible of exact pecuniary measurement. In these cases the sum fixed is reduced to the actual interest. —2 Par. n. 593, p. 479; 1 Bell, Com. 544, 546; Ang. § 288; 2 Alau. n. 552, p. 484. [III. 351.]

2593. Insurance effected by a person on his own life is void if he die by the hands of justice, by duelling, or by suicide. — Ellis, 192, 3, n. 1, 195 n. 1; 4 Bligh R. 164, N. S. Bolland vs. Disney; 2 Alau. 563; Ang. § 289 --. [III. 351.]

TITLE SIXTH.

OF BOTTOMRY AND RESPONDENTIA.

2594. Bottomry is a contract whereby the owner of a ship or his agent, in consideration of a sum of money loaned for the use of the ship, undertakes conditionally to repay the same with interest, and hypothecates the ship for the performance of his contract. The essential condition of the loan is that if the ship be lost by a fortuitous event or irresistible force, the lender shall lose his money; otherwise it is to be repaid with a certain profit for interest and risk.—1 Va. O. M. l. 3, t. 5, a. 2; Poth. Pr. G. A. n. 9; 2 Em. 411, 417; 3 Par. n. 887, 890; 1 Bell, Com. 433; Sm. M. L. 419; Abbott, 113 --; Woolrych, 35; Marsh. 742, 3; 3 Kt. 533-5; 1 Ph. n. 298; C. Co. 314; 2 Bor. O. 1673, t. 7. a. 2, 649, n. [III. 353.]

2595. If the loan be made not upon the ship but upon the goods laden in her the contract is called respondentia. — Auth.

under a. 2594. [III. 353.]

2596. The loan may be made upon the ship, freight and cargo together, or upon such portion of either as may be agreed upon by the parties. —Same auth. [III. 353.]

2597. The contract must specify: 1. The amount of money loaned with the rate of interest to be paid; 2. The objects upon which the loan is made. It specifies also the nature of the risk.—Poth. Pr. G. A. n. 7, --; Mac. 52, 53; Sm. M. L. 419; 1 Bell, Com. 434; 3 Par. n. 890; C. Co. 311. [III. 353.]

2598. If the time of the risk do not appear from the contract, it runs, with respect to the ship and freight, from the day she sails until she is anchored or moored in the place of her destination.—With respect to the cargo, it runs from the time the goods are shipped until their delivery ashore.—ff. L. 3, de naut. fen.; 2 Va. O. M. ib. a. 13, p. 15; Marsh. 764; C. Co. 328. [III. 353.]

2599. In loans upon bottomry the ship, with her tackle, furniture, armament and provisions, and freight earned, are held by privilege for the payment of the capital and interest of the money loaned upon them.—In loans upon respondentia the cargo is held in like manner.—If the loan be upon a part only of the ship or cargo such part only is held for the payment.—2 Va. O. M. ib. a. 7, Poth. Pr. G. A. n. 9--; Marsh. 750; C. Co. 320. [III. 353.]

2600. Loans in the nature of contracts of bottomry or respondentia cannot be made upon the wages of sailors.—Va. O. M. ib. a. 5, 6; Poth. Pr. G. A. n. 15; 2 Em. 507, 508; 1 Bell, Com. 435, n. 465; 3 Kt. Com. 363; Marsh. 754; C. Co. 319. [III. 353.]

2601. A loan made for a sum exceeding the value of the objects affected for the payment of it may be annulled at the instance of the lender, if fraud be proved against the borrower. — If there be no fraud, the contract is valid to the amount of the objects affected for the payment, and the surplus of the sum borrowed must be repaid with legal interest at the place of borrowing. —2 Va. O. M. ib. a. 3, 15, p. 6, 16; Poth. Pr. G. A. n. 12, 13; 2 Em. 501--; Marsh. 750, 751; 3 Kt. 357; C. Co. 316, 317. [III. 353.]

2602. The borrower upon respondentia is not discharged from his liability by the loss of the ship and cargo; unless he proves that he had goods aboard, at the time of the loss, of the value of the amount loaned to him.—2 Va. O. M. ib. a. 14, p. 15; 3 Par. n. 929; C. Co. 329; Author. under a. 2601. [III. 355.]

2603. A loan upon bottomry or respondentia may be made to the master, in case of urgent necessity, for the repair and other uses of the ship; but, if made to him without the authority of the owners in the place where they reside, or where communication with them is easy, such part only of the ship or cargo as may belong to the master is held

for the payment of the loan; subject to the provisions contained in the next following article.—2 Va. O. M. ib. a. 8, p. 10; 2 Em. 424, 436; 3 Par. n. 909, p. 507; 1 Bell, Com. 428-432, 441; 3 Kt. 356-7; Sm. M. L. 421, 422; Abbott, 153, 154; C. Co. 321. [III. 355.]

2604. The parts of the owners, even if residing in the place where the loan is made, are held for the payment of money loaned to the master for repairs and provisions, when the ship has been affreighted with the consent of such owners, and they have refused to furnish their contingent for putting her in condition for the voyage.—2 Va. O. M. ib. a. 9; Ib. b. 2, t. 1, a. 17; C. Co. 322; Auth. under a. 2603. [III. 355.]

2605. Loans upon bottomry or respondentia, made for the latest voyage, are paid by preference before those of a preceding one, even when it is declared that the latter are continued by a formal renewal. —The loans made during the voyage are paid by preference over those contracted before the departure of the ship; and if several loans be contracted during the voyage the last is preferred to any which precede it. — 2 Va. O. M. ib. a. 10; Guidon, c. 19, a. 2, 3; Poth. Pr. G. A. n. 53; 3 Par. n. 919; Sm. M. L. 424; Abbott, 163-4; 1 Bell, Com. 438; 3 Kt. 358; C. Co. 323. [III. 355.]

2606. The lender upon respondentia does not bear the loss of goods which perish by perils of the sea, when such goods have been transferred from the ship specified in the contract into a different one; unless it is proved that such transfer was caused by irresistible force.—Poth. Pr. G. A. 18; 2 Em. 549; 3 Bou.-Pat. 158, 164, 171, 6; Marsh. 764; 3 Kt. 360; Co. C. 324. [III. 355.]

2607. If the ship or cargo upon which a loan is made be totally lost, by a fortuitous event or irresistible force, within the time and place for which the risk extends, the money loaned cannot be recovered.—2 Va. O. M. ib. a. 11, p. 12; Poth. Pr. G. A. n. 16; Marsh. 759, 760, 762, 768; 1 Bell, Com. 433, n. 460; 1 Kt. 355; C. Co. 325. [III. 355.]

2608. Losses arising from defect in the thing, or caused by the act of the owners, master, or charterer, are not considered fortuitous events, unless there is a special agreement to the contrary.—2 Va. O. M. ib. a. 12, p. 14; Poth. Pr. G. A. n. 34; Em. c. 1, s. 2; 1 Bell, Com. 437; Marsh. 762; 3 Kt. 355; C. Co. 326. [III. 357.]

2609. In case of partial loss by shipwreck or other fortuitous event, the payment of the sum loaned is reduced to the value of the things held for it which are saved.—2 Va. O. M. ib. a. 17, p. 12, 20; Poth. Pr. G. A. n. 47; 2 Em. 544, 547; 3 Kt. 359; Marsh. 768; C. Co. 327. [III. 357.]

2610. Lenders upon bottomry or respondentia contribute to general average in discharge of the borrower.—They do not contribute to simple average or particular damages, unless there is an arrangement

to that effect.—2 Va. ib. a. 16; 2 Em. 529; Poth. Pr. G. A. n. 42-6; Marsh. 760-5; 1 Bell, 437; C. Co. 330, 400, 403; 3 Kt. 359, 360. [III. 357.]

2611. If there be a loan and also an insurance upon the same ship or cargo, the lender is preferred to the insurer upon whatever is saved from the shipwreck, for the capital only of his loan.—2 Va. C. M. ib. a. 18, p. 12, 13, 20; Poth. Pr. G. A. n. 49; 2 Em. 267, 8; 1 Ph. 301, 302; C. Co. 331; Par. 855; Merl. Grosse aventure, 322; Arn. 1188. [III. 357.]

2612. Bottomry and respondentia bonds made payable to order may be negotiated by indorsement. Such negotiation of them has the same effect and produces the same rights as the transfer of other negotiable instruments.—2 Em. 553, 4; Mac. 53; Abbott, 115. [III. 357.]

FINAL PROVISIONS.

2613. The laws in force at the time of the coming into force of this code are abrogated in all cases:—In which there is a provision herein having expressly or impliedly that effect;—In which such laws are contrary to or inconsistent with any provision herein contained;—In which express provision is herein made upon the particular matter to which such laws relate;—Except always that as regards transactions, matters and things anterior to the coming into force of this code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this code would apply to such transactions, matters and things remain in force and apply to them, and this code applies to them only so far as it coincides with such provisions. [III. 391.]

2614. The declaration that certain matters are regulated by the Code of Civil Procedure shall not have the effect of repealing any existing rule or of abolishing any mode of proceeding now in use until the said Code of Civil Procedure shall have become law. [III. 391.

2615. If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.

END.

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SPECIAL REFERENCES.

NOTARIES.

The articles more particularly useful to notaries in the course of their practice are the following :—

79 to **85**, concerning the domicile of persons.

256 to **261**, the holding of family councils for the appointment of tutors.

651--, renunciation of successions.

662--, the inventory to be made by a beneficiary heir.

698, licitation of immoveables by consent.

699--, accounts and partition of successions.

776, **786**--, **791**, **793**, the form of gifts, and their acceptance.

843--, the form and requisites of wills.

857, the giving up of holograph wills.

1163, requisites for the validity of a tender.

1208--, requisites of notarial instruments.

1215, authenticity of notarial copies.

1264, **1266**, form of marriage covenants.

1260, re-establishment of community after separation.

1324, **1336**, **1342**, inventories in matters of community.

1354--, partition of community.

1384--, conventional community and its clauses.

1732, rights and obligations of notaries.

2119, obligation of registering tutorships.

2148, obligation of registering discharges.

2168, mode of describing property.

2260, **2267**, prescriptions against notaries.

2298--, **2319**, **2326**--, **2346**, protest and notice of protest of bills and notes.

2415, requisites of charter-parties.

2597, requisites of bottomry bonds

CLERGYMEN.

The articles in which clergymen are more particularly interested are the following :—

34, as regards the disabilities resulting from religious profession.

39 to **78**, comprising the whole title *Of acts of civil status*, concerning the registers of births, deaths, and marriages.

108, as to marriage of the husband or wife of an absentee.

115 to **135**, marriage and its formalities.
157, **158**, penalty against clergymen contravening the law respecting marriage.
769, validity of gifts to spiritual advisers of donor.
839, validity of legacies to spiritual adviser of testator.
848, clergymen can no longer execute wills, except in Gaspe.
1994, **1997**, privilege for tithes.
1994, **2002**, privilege for funeral expenses.
2219, prescription of arrears of tithes.
2276, exemption from imprisonment

PHYSICIANS.

A few articles only apply specially to physicians.
769, as to the validity of gifts to one's medical adviser.
839, validity of legacies to medical adviser of testator.
1994, **2003**, **2009**, **2107**, privilege for expenses of last illness.
2260, **2267**, prescription of their claims for professional services.

REAL ESTATE OWNERS.

Several whole portions of the Code, sufficiently indicated by the titles they bear, relate to real estate and its owners; besides these, the following articles are also particularly applicable:—
6, what laws govern real estate in Lower Canada.
377 to **380**, what things form part of real estate.
407, no one is obliged to give up his property without compensation.
414 to **428**, what rights accompany the ownership of immoveable property.
504, right of having boundaries settled.
505, right to have fences built at common expense.
506 and the remainder of the chapter, as to property relations with neighbours.
1479, expense of deed of sale borne by buyer.
1500--, excess or deficiency in contents of an immoveable sold, how remedied.
1612--, rights and obligations of lessors.
1626--, rights and obligations of lessees.
1690, contractors cannot claim payment for extras unless they are agreed to in writing.
2259, ten years prescription in favor of architects and contractors.

MERCHANTS.

Merchants, and persons engaged in commercial pursuits, should read the whole of the Fourth Book, and generally the titles *Of Sale*, *Of Lease*, *Of Exchange*, *Of Mandate*, *Of Loan*, *Of Deposit*, *Of Partnership*, *Of Transaction*, *Of Suretyship*, *Of Pledge*, and portions of the titles *Of Privileges and Hypothecs*, *Of Registration*, indicated by their headings.

They are also referred to the following articles particularly :—

17 §§ 20, 23, defining the value of the pound sterling and sovereign, and the meaning of the word "bankruptcy."

176, 179, 1296, as to married women engaged in trade.

323, as to minors engaged in trade.

367, what corporations may carry on the business of banking.

803, gifts made by traders within three months of their insolvency.

993, when fraud is a cause of nullity.

1025, 1027, 1472, how ownership passes by contract alone without delivery.

1031 to 1040, recourse of creditors against fraudulent debtors.

1158--, rules as to the imputation of payments and effect of receipts.

1226, date of commercial writings.

1235, when writings are necessary.

1313, as to judgments separating wife's property from her husband's, especially in the case of traders.

1478, when a promise of sale is equivalent to a sale.

1488, when a trader may sell what does not belong to him.

1495, seller liable for cost of delivery, and buyer for cost of removal.

1656, effect of insolvency upon leases.

1672--, obligations and liabilities of carriers.

2006, privilege of merchants' clerks for wages.

2260, 2267, prescription of bills and notes, and of claims for goods sold.

2262, 2267, prescription of claims of merchants' clerks for wages.

PERSONS OUT OF LOWER CANADA.

6, what laws govern property in Lower Canada.

7, validity in Lower Canada of acts and deeds made elsewhere.

8, how deeds executed out of Lower Canada are construed.

18, rights of British subjects not born in Lower Canada

28, Lower Canadians may be sued in Lower Canada for debts contracted abroad.

29, when security for costs must be given.

135, marriage of Lower Canadians out of Lower Canada is valid if according to the formalities of the place where it is solemnized.

609, aliens may inherit in Lower Canada.

844, 851, aliens may be witnesses to wills.

1220--, proof of writings executed out of Lower Canada.

2190, 2191, effect of foreign prescriptions.

2321, as to bills drawn abroad upon Lower Canadians.

CONCORDANCE

OF THE

CODE NAPOLEON AND *CODE DE COMMERCE*

WITH THE

CIVIL CODE OF LOWER CANADA.

The first numbers indicate the articles of the *Code Napoléon*, or of the *Code de Commerce*; the second are those of the articles of the Civil Code of Lower Canada.

CODE NAPOLÉON.

1	1	46	51	111	85	142	114
-	2	47	1220	112	87	144	115
2	2613	48	1220	113	87	145	115
3	6	49	76	-	88	146	116
-	7	-	77	114	90	147	118
4	11	50	53	115	86	148	119
6	13	51	52	-	93	-	121
7	18	53	48	116	88	149	120
8	18	57	54	117	95	150	122
9	21	63	57	120	93	151	123
-	22	-	58	-	94	152	123
10	20	-	150	121	93	153	123
11	25	65	60	-	94	156	158
12	23	68	61	122	93	159	121
13	24	69	65	-	94	160	122
14	27	74	63	123	93	161	124
15	28	75	129	-	94	162	125
16	29	76	65	124	109	163	1
22	31	77	66	-	110	164	1
23	32	78	67	-	111	165	1
24	33	79	67	125	96	166	130
25	35	80	68	126	97	167	131
-	36	81	69	127	107	168	132
26	37	99	75	129	98	169	133
35	39	-	77	130	99	170	135
36	40	100	78	131	100	172	136
38	41	101	76	132	101	173	137
39	55	102	79	133	102	-	138
-	64	103	80	134	103	174	139
-	67	104	81	135	104	-	141
40	42	105	81	136	105	-	142
41	45	106	82	137	106	175	138
42	46	107	82	138	107	176	144
43	47	108	83	139	108	177	145
-	49	109	84	140	112	178	146
45	50	110	600	141	113	179	147

180	117	275	186	417	264	479	315
-	148	299	211	418	265	480	318
181	147	300	212	419	266	481	319
182	150	301	213	420	267	482	320
183	151	302	214	422	267	483	321
184	152	303	215	424	268	484	3-
185	153	304	216	425	270	487	323
186	154	306	186	426	271	488	324
187	155	307	193	432	273	489	325
191	156	308	208	433	274	490	327
192	157	309	217	434	275	492	328
193	158	311	208	435	276	493	328
194	159	312	218	436	277	494	329
195	160	-	220	437	278	495	329
196	161	313	117	438	279	496	330
197	162	-	219	439	280	499	331
201	163	-	220	440	281	500	332
202	164	314	221	442	282	501	333
203	165	-	222	443	284	502	334
205	166	315	227	444	285	503	335
206	167	316	223	446	286	504	335
207	168	317	224	-	287	505	341
208	169	318	225	447	288	506	342
209	170	319	228	448	289	507	342
210	171	320	229	449	286	508	344
211	172	321	230	450	290	509	343
212	173	322	231	451	292	512	336
213	174	323	232	452	293	513	349
214	175	324	233	455	295	-	351
215	176	325	234	-	296	514	350
217	177	328	235	456	296	516	374
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218	178	331	237	458	298	519	377
219	1318	332	238	459	299	520	373
220	179	333	239	460	300	521	378
222	180	338	240	-	709	522	379
223	181	340	241	461	301	523	379
224	182	341	241	-	643	524	379
225	183	342	241	462	302	525	380
226	184	371	242	-	643	526	381
227	185	372	243	463	303	527	383
229	187	373	243	-	739	528	384
230	188	374	244	464	304	529	387
231	189	375	245	465	305	-	388
233	186	388	246	-	691	530	389
234	192	389	249	466	691	-	390
235	199	393	345	-	693	-	391
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267	200	402	249	469	308	532	386
268	195	405	249	470	309	533	395
-	201	406	250	471	310	534	396
-	202	407	251	472	311	535	397
269	203	408	252	473	312	536	398
270	204	409	253	474	313	537	399
271	205	410	254	475	2243	538	400
272	196	411	255	476	314	539	401
273	197	-	256	478	315	540	402

541	403	597	459	657	514	717	588
542	404	598	460	638	515	-	589
543	405		461	659	516	-	590
544	406	599	462	660	517	-	593
545	407	600	463	661	518	718	601
546	408	601	464	662	519	719	602
547	409	602	465	663	520	720	603
548	410	603	466	664	521	721	604
549	411	604	467	665	522	722	605
550	412	605	468	666	523	723	606
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552	414	607	470	668	525	725	608
553	415	608	471	669	526	726	609
554	416	609	471	670	527	727	610
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556	420	613	475	674	532	731	614
557	421	614	476	675	533	732	599
558	422	615	477	676	534	733	629
559	423	616	478	677	535	-	633
560	424	617	479	678	536	-	634
561	425	618	480	679	537	734	629
562	426	619	481	680	538	-	633
563	427	620	482	681	539	-	634
564	428	621	483	682	540	735	615
565	429	622	484	683	541	736	616
566	430	623	485	684	542	737	617
567	431	624	486	686	545	738	618
568	432	625	488	687	546	739	619
569	433	626	489	688	547	740	620
570	434	627	490	689	548	741	621
571	435	628	491	690	549	742	622
572	436	629	492	691	549	743	623
573	437	630	493	692	551	744	624
574	438	631	494	693	551	745	625
575	439	-	1606	695	550	746	628
576	440	632	495	696	552	-	629
577	442	633	496	697	553	747	630
578	443	634	497	698	554	748	626
579	444	-	1606	699	555	749	627
580	445	635	498	700	556	750	632
581	446	636	442	701	557	751	631
582	447	637	499	702	558	752	633
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587	452	646	504	707	563	767	636
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589	454	649	506	709	565	769	638
590	455	650	507	710	566	770	639
591	455	651	508	711	583	772	640
592	455	652	509	712	583	774	642
593	455	653	510	713	584	775	641
594	456	654	511	714	585	776	643
595	457	655	512	715	587	777	644
596	458	656	513	716	586	778	645

588	779	646		837	708		894	755		946	782
589	780	647		838	693		895	756		-	824
590	781	648		839	709		896	925		947	782
593	782	649		840	1009		897	757		-	783
601	783	650		-	1010		-	925		-	784
602	784	651		841	710		898	925		-	825
603	785	652		842	711		899	777		948	786
604	786	653		843	712		900	760		949	777
605	787	654		845	713		901	761		951	779
606	788	655		846	714		-	831		952	779
607	789	656		847	715		-	834		953	811
608	790	657		848	716		902	761		-	812
609	791	658		849	717		-	765		-	816
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599	-	344		856	722		-	832		959	813
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633	797	666		858	724		-	838		965	812
634	798	667		-	728		907	767		967	830
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633	800	669		860	728		908	768		968	841
634	801	670		-	733		909	769		969	843
615	802	671		861	729		-	839		970	850
616	803	672		-	733		910	766		971	844
617	804	673		862	729		911	774		972	843
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619	806	675		865	731		913	775		973	843
620	808	676		-	745		914	773		974	843
621	809	679		867	732		931	776		975	844
622	-	680		868	725		932	787		979	847
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625	812	685		870	735		933	789		1000	2110
628	813	686		-	736		934	789		1001	855
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626	816	690		-	739		937	789		1003	873
627	817	691		874	741		938	777		1004	891
632	818	692		875	740		-	795		1005	891
631	819	693		876	742		939	804		1006	891
633	-	709		878	743		940	810		1007	857
634	822	694		879	743		941	806		1008	891
635	823	695		880	743		-	810		1009	875
240	824	696		881	744		-	939		1010	873
240	826	697		882	745		-	940		1011	891
636	827	698		883	746		-	942		1012	875
637	828	699		884	748		942	792		1013	875
638	829	700		885	749		-	810		-	880
639	830	701		886	750		943	778		1014	866
640	831	702		887	751		-	818		-	891
642	832	703		888	747		-	819		1015	871
641	833	704		889	751		-	820		1017	880
643	834	705		890	752		944	783		1018	891
644	835	706		291	753		-	824		1019	888
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